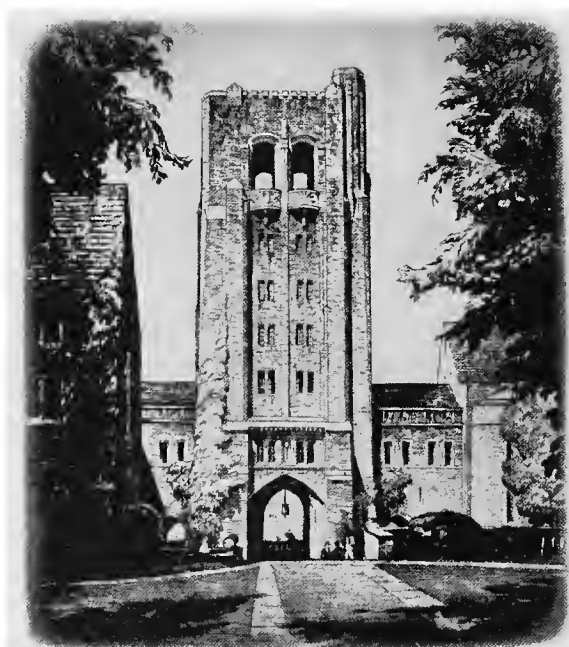


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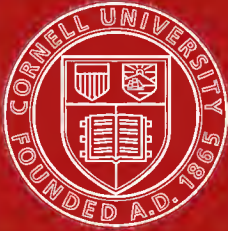


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# TRIAL EVIDENCE

A SYNOPSIS  
OF THE  
LAW OF EVIDENCE  
GENERALLY APPLICABLE  
TO TRIALS

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BY

RICHARD LEA KENNEDY, LL. B.  
OF THE ST. PAUL BAR

ST. PAUL, MINN.  
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1906

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## PREFACE.

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In order that knowledge of the Law of Evidence may be of value, it must be exact and readily available. In this little book the effort is made to state the law concisely, but it should be used as a reference book, because only by studying the text books referred to, and the cases therein cited, can a complete knowledge of the subject be obtained.

Text books, rather than cases, are cited, because in this way the greatest number of cases can be referred to in the most limited space.

The editions referred to are the following:

1. American & English Encyclopedia of Law (Second Edition).
2. Elliott on Evidence (1904).
3. Encyclopedia of Pleading and Practice (First Edition).
4. Greenleaf on Evidence (1899).
5. Stephen on Evidence (1903).
6. Wigmore on Evidence (1904-1905).

The books of cases on evidence which are referred to are:

1. Thayer's Cases (1900).
2. Wigmore's Cases (1906).

While local statutes are generally referred to, no attempt has been made to cite them exhaustively.

November, 1906.

R. L. K.





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# SYNOPSIS OF EVIDENCE.

## THE LAW OF EVIDENCE.

The law of evidence has been defined as, "A system of principles and rules established by the statutes enacted by the law-making power and by the decisions of the courts. \* \* \* The rules and principles are intended and designed to bring to the minds of the triers of the facts, whether judges or jurors, the evidentiary facts which shall enable them to infer the ultimate facts upon which a decision must be made."<sup>1</sup>

"The law of evidence has to do with the furnishing to a court of matter of fact, for use in a judicial investigation. \* \* \* (a) It prescribes the manner of presenting evidence. \* \* \* (b) It fixes the qualifications and the privilege of witnesses, and the mode of examining them. (c) And chiefly, it determines, as among probative matters, matters in their nature evidential,—what classes of things shall not be received. This excluding function is the characteristic one in our law of evidence."<sup>2</sup>

The law of evidence governs the presentation of facts, otherwise than by comment or argument, before a legal tribunal.

## EVIDENCE DEFINED.

Evidence has been defined as "All the means, except mere argument or comment, by which the existence or nonexistence of disputed facts is established."<sup>3</sup>

From another view-point it has been defined as "any relevant element of fact, or matter of fact, from which an inference may be legitimately drawn as to another relevant matter of fact."<sup>4</sup>

Many other definitions have been formulated.<sup>5</sup>

## WHAT NEED NOT BE PROVED.

No evidence need be produced to establish:

- (a) That which is admitted, either by the pleadings or in open court.<sup>6</sup>
- (b) That of which the court takes judicial notice.<sup>7</sup>
- (c) That which is presumed, unless and until evidence rebutting the presumption is admitted.<sup>8</sup>

<sup>1</sup> Elliott. § 5.

<sup>2</sup> Thayer's Cas. p. 2.

<sup>3</sup> 11 A. & E. Enc. p. 487.

<sup>4</sup> Elliott, § 6.

<sup>5</sup> Greenl. § 1; Stephens' Dig. p. 4; § 2565-2582; Wigmore's Cas. 634-641. Wigmore, § 1.

<sup>6</sup> 11 A. & E. Enc. pp. 488, 489; Elliott, Current Law, p. 1303; Elliott, §§ 76-77; Greenl. § 186; Stephens' Dig. p. 339; Thayer's Cas. p. 111; Wigmore, §§ 1057, 2588-2595; Wigmore's Cas. pp. 642-647.

<sup>7</sup> 17 A. & E. Enc. pp. 894-947; 5 Current Law, p. 1302; Elliott, §§ 36-75; Greenl. §§ 3a-6e; Stephens' Dig. pp. 319-338; Thayer's Cas. pp. 13-38; Wigmore, § 2565-2582; Wigmore's Cas. 634-641.

<sup>8</sup> 22 A. & E. Enc. pp. 1233-1291; 5 Current Law, p. 1303; Elliott, §§ 76-127; Greenl. §§ 14w-48; Stephens' Dig. pp. 481-498; Thayer's Cas. pp. 38-69; Wigmore, §§ 2490-2540; Wigmore's Cas. pp. 604-626.

It may be stated generally that facts in issue and facts relevant to the issue may be proved.<sup>1</sup>

#### GENERAL RULE.

Whatever is logically irrelevant is excluded. Whatever is logically relevant is admissible, unless rendered inadmissible by an exclusionary rule.<sup>2</sup>

"There are tests of admissibility other than logical relevancy. Some things are rejected as being of too slight a significance, or as having too conjectural and remote a connection; others as being dangerous, in their effect on the jury, and likely to be misused or over-estimated by that body; others as being impolitic, or unsafe on public grounds; others on the bare ground of precedent."<sup>3</sup>

#### DIVISION OF THE SUBJECT.

It is manifest that all one's knowledge—except intuitive knowledge—is necessarily limited to, and can be resolved into,

- (a) what one has thought, said and done,
- (b) what one has perceived through the five senses,
- (c) the opinions formed upon this data.

From (a) and (b), *supra*, results "personal knowledge;" and the knowledge gained through the senses of sight and hearing, by reading or being told of matters not within the field of personal observation, may be termed "hearsay."

In so far as knowledge is gained by reading, it is based upon "documentary" evidence.

Evidence presented to a tribunal otherwise than by witnesses, or by the production of "documents" is generally termed "real evidence"—here the evidence is presented directly to the tribunal, at first hand.

It is customary to divide the instruments of evidence into three classes, to wit (1) witnesses, (2) documents and (3) real evidence;<sup>4</sup> but, because the terms "documents" and "real evidence," do not seem to be sufficiently comprehensive to embrace the matters usually considered under those heads, (e. g. experiments, photographs, etc.) it seems better to divide the subject into (1) witnesses, (2) exhibits, (which properly embrace documents, real evidence, experiments, photographs, etc.) and (3) view; although a view is by some courts, improperly it would seem, not regarded as evidence.

<sup>1</sup> 11 A. & E. Enc. pp. 502-519; 5 *rent Law*, p. 1308; Elliott, §§ 146-149; *Current Law*, p. 1308; Elliott, §§ 143- Greenl. § 13a; Thayer's *Cas.* p. 3; Wig- 193; Greenl. §§ 14-14v; Stephens' *Dig.* more, §§ 9, 10.

pp. 19-95; Wigmore, §§ 24-464.

<sup>2</sup> Thayer's *Cases*, p. 3.

<sup>3</sup> 11 A. & E. Enc. pp. 501, 502; 5 *Cur-* <sup>4</sup> Elliott, § 687.





A. COMPETENCY OF WITNESSES.<sup>1</sup>

At common law, a person was not competent to testify:

**First.** If he had been convicted and adjudged guilty of an infamous crime, unless a pardon or a reversal of the judgment had been secured. By the weight of authority a conviction by a court of another jurisdiction did not disqualify.<sup>1</sup>

**Second.** If he did not believe in a God who would punish perjury.<sup>2</sup>

**Third.** If he had a direct and beneficial interest in the event of the suit.<sup>3</sup>

**Fourth.** If of such immature<sup>4</sup> or defective<sup>5</sup> intellect that he did not realize the sanctity of an oath, or was incapable of adequate observation, recollection and communication.

Whether the immaturity or other deficiency of intellect is sufficient to render a witness incompetent is in each instance a question to be determined by the judge. At common law the competency of a person less than fourteen years of age was not presumed; if above that age his competency was presumed.

**Fifth.** Neither a husband nor a wife could testify for or against the other;<sup>6</sup> to this rule, however, a few exceptions were recognized.<sup>7</sup>

NOTE. By statutes in nearly every jurisdiction the disqualifications stated in first,<sup>8</sup> second<sup>9</sup> and fifth<sup>10</sup> rules supra, have been abolished. The disqualification stated in rule third<sup>11</sup> supra is by statutes, varying in terms, generally limited to the testimony of parties, or persons interested, in actions where the adverse party is the representative, survivor, or successor of deceased, or, under some statutes, of incompetent persons. In fact the entire matter of competency of witnesses is generally regulated by statutes.<sup>12</sup>

<sup>1</sup> 16 A. & E. Enc. pp. 245-252; Elliott, Stephens' Dig. p. 512; Wigmore, §§ 784-792; Greenl. §§ 372-378; Wigmore, §§ 519-523.

<sup>2</sup> 30 A. & E. Enc. pp. 936-939; Elliott, §§ 773-778; Greenl. §§ 368-370; Stephens' Dig. p. 508; Wigmore, §§ 495, 518.

<sup>3</sup> 30 A. & E. Enc. pp. 911-931; Elliott, §§ 723-749; Greenl. §§ 328b-346; Stephens' Dig. p. 508; Wigmore, §§ 575-587.

<sup>4</sup> 16 A. & E. Enc. pp. 267-271; Elliott, §§ 750, 766-771; Greenl. § 370, d; Stephens' Dig. p. 507; Wigmore, §§ 488, 505-509.

<sup>5</sup> 30 A. & E. Enc. pp. 933-936; Elliott, §§ 750-765; Greenl. § 370, b. c. e.; Stephens' Dig. p. 507; Wigmore, §§ 483, 492-501.

<sup>6</sup> 30 A. & E. Enc. pp. 942-968; Elliott, §§ 732-736; Greenl. §§ 333c-346; Statutes).

<sup>7</sup> 30 A. & E. Enc. pp. 954-958; Elliott, §§ 734-736; Greenl. § 343; Wigmore, §§ 612-617.

<sup>8</sup> 16 A. & E. Enc. p. 252; Elliott, § 793; Greenl. § 378a; Wigmore, §§ 488, 524.

<sup>9</sup> 30 A. & E. Enc. p. 939; Elliott, § 779; Greenl. § 370a; Stephens' Dig. p. 508; Wigmore, § 488.

<sup>10</sup> 30 A. & E. Enc. pp. 958-968, 981; Elliott, §§ 733, 734; Wigmore, §§ 488, 619, 620. These statutes do not, generally, relate to privileged communications. Elliott, § 628; Greenl. § 254.

<sup>11</sup> 30 A. & E. Enc. pp. 911, 978-1062; Elliott, §§ 737, 738, 740; Greenl. §§ 328b, 333b; Stephens' Dig. p. 508; Wigmore, §§ 488, 576-579.

<sup>12</sup> Wigmore, § 488 (summary of

\* See Thayer's Cases, pp. 1066-1107, and Wigmore's Cases, pp. 58-106. For current cases supplementing all citations in this section, see 4 Current Law, p. 1944, and subsequent volumes.



## 1. TESTIMONIAL PRIVILEGE.

A witness is not obliged to answer any question, the answer of which would tend<sup>1</sup> to expose him to a criminal charge, under the laws governing the trial court,<sup>2</sup> or to a penalty<sup>3</sup> or to a forfeiture;<sup>4</sup> in some jurisdictions he may also refuse to answer if he would be thereby disgraced<sup>5</sup> or rendered infamous.<sup>6</sup>

The privilege is not recognized if the answer merely exposes the witness to a civil action, or to pecuniary loss.<sup>7</sup>

The privilege is generally held to warrant a refusal to produce an incriminating document<sup>8</sup> or to submit to a corporal inspection.<sup>9</sup>

The privilege is personal, and can be claimed by no one but the witness.<sup>10</sup>

Whether or not the witness is entitled to claim the privilege is usually regarded as a question for the Court,<sup>11</sup> but in some jurisdictions the witness may determine it.<sup>12</sup>

The privilege may be waived by voluntary testimony<sup>13</sup> and will not be recognized if the witness is protected by the statute of limitations, by a pardon, or by statutes providing immunity, if the immunity is complete.<sup>14</sup>

The claim of privilege by the witness should not, and, by the weight of authority, does not, warrant any inference.<sup>15</sup>

<sup>1</sup> 30 A. & E. Enc. 1154; Elliott, § 1003; Greenl. § 469d; Stephens' Dig. p. 553; Wigmore, § 2260.

<sup>2</sup> 30 A. & E. Enc. 1154-1156, 1158, 1159; Elliott, §§ 1001, 1002; Greenl. § 469d; Stephens' Dig. p. 553; Wigmore, §§ 2250-2252, 2258, 2260, 2261.

<sup>3</sup> 30 A. & E. Enc. 1156; Elliott, § 1006; Greenl. § 469h; Stephens' Dig. p. 553; Wigmore, § 2257.

<sup>4</sup> 30 A. & E. Enc. 1156; Elliott, 1006; Greenl. § 469h; Stephens' Dig. 553; Wigmore, § 2256.

<sup>5</sup> 30 A. & E. Enc. 1157, 1158; Elliott, § 1005; Greenl. § 469i, j, k, l; Wigmore, §§ 984-986, 2255.

<sup>6</sup> 30 A. & E. Enc. 1157, 1158; Elliott, § 1005; Greenl. §§ 469i, j, k, l; Wigmore, § 2255.

<sup>7</sup> 30 A. & E. Enc. 1156; Elliott, § 1004; Greenl. § 469g; Stephens' Dig. pp. 553, 554; Wigmore, § 2254.

<sup>8</sup> 30 A. & E. Enc. 1159; Elliott, §§ 1006, 1013; Greenl. § 469f, n; Wigmore, §§ 2219, 2264.

<sup>9</sup> 30 A. & E. Enc. 1160; Elliott, § 1014; Greenl. § 469e, m; Wigmore, § 2265 (criticism); 5 Curr. Law 1022, note.

<sup>10</sup> 30 A. & E. Enc. 1165, 1166; Elliott, § 1007; Greenl. § 469d; Wigmore, §§ 2196, 2270.

<sup>11</sup> 30 A. & E. Enc. 1166, 1167; Elliott, § 1008; Greenl. § 469d; Stephens' Dig. p. 553; Wigmore, § 2271.

<sup>12</sup> Elliott, § 1008; Wigmore, § 2271.

<sup>13</sup> 30 A. & E. Enc. 1162-1164, 1167-1170; Elliott, §§ 1001, 1012; Greenl. § 469d; Wigmore, §§ 2275-2277.

<sup>14</sup> 30 A. & E. Enc. 1160-1165; Elliott, §§ 1010, 1011; Greenl. § 469d; Wigmore, §§ 2280-2282.

<sup>15</sup> 30 A. & E. Enc. 1170; Elliott, § 1009; Greenl. § 469d (d); Wigmore, §§ 2272, 2273.

\* See Thayer's Cases pp. 1107-1184; Wigmore's Cases, pp. 441-525. For current cases supplementing all citations in this section see 4 Current Law, 1968, and subsequent volumes.



## 2. PRIVILEGED COMMUNICATIONS.\*

Upon grounds of public policy<sup>1</sup> many matters are regarded as privileged, and, notwithstanding their relevancy and materiality, they need not or cannot be put in evidence.

(a) **State secrets** or other matters of this nature relating to the affairs of the state or nation need not be disclosed.<sup>2</sup>

The executive or the heads of departments are permitted to determine when a privilege of this character should be claimed.<sup>3</sup>

(b) **Judicial matters.** Neither a grand juror, a petit juror, nor an arbitrator is permitted to testify for the purpose of impeaching the indictment,<sup>4</sup> verdict,<sup>5</sup> or award,<sup>6</sup> but they, respectively, may testify in support thereof.<sup>7</sup>

It may be stated generally that neither grand jurors, the prosecuting attorney, the clerk, nor the witnesses are permitted to testify concerning the proceedings of the grand jury,<sup>8</sup> but after the purpose of secrecy has been accomplished, the proceedings before a grand jury may be disclosed,<sup>9</sup> and at all times a disclosure rests largely in the discretion of the court.<sup>10</sup> Grand jurors are permitted to testify concerning confessions or admissions made, or perjury committed before them, and also to impeach a witness by proof of inconsistent statements.<sup>11</sup>

The privilege applies to matters occurring, or statements made before petit jurors during retirement,<sup>12</sup> and usually a judge<sup>13</sup> or an arbitrator<sup>14</sup> may claim it regarding proceedings before them.

<sup>1</sup> 23 A. & E. Enc. p. 50; Elliott, §§ 621, 639; Greenl. § 236.

<sup>2</sup> 23 A. & E. Enc. p. 51; Elliott, § 639; Greenl. §§ 250, 251; Stephens' Dig. p. 533; Wigmore, §§ 2367-2375.

<sup>3</sup> 23 A. & E. Enc. p. 51; Elliott, § 639; Greenl. §§ 250, 251; Stephens' Dig. p. 533; Wigmore, § 2376 (states that the question is for the court).

<sup>4</sup> 17 A. & E. Enc. p. 1295; Elliott, § 642.

<sup>5</sup> 29 A. & E. Enc. pp. 1008-1012; Elliott, § 640; Greenl. § 252a; Stephens' Dig. p. 535; Wigmore, §§ 2352-2354.

<sup>6</sup> 23 A. & E. Enc. p. 52; Elliott, § 644; Wigmore, § 2358.

<sup>7</sup> 17 A. & E. Enc. p. 1295; Elliott, §§ 640, 642, 644.

<sup>8</sup> 17 A. & E. Enc. pp. 1294-1297; Elliott, §§ 641, 642; Greenl. § 252; Stephens' Dig. p. 535; Wigmore, §§ 2360-2364.

<sup>9</sup> 17 A. & E. Enc. p. 1294; Elliott, § 642.

<sup>10</sup> 17 A. & E. Enc. p. 1294; Elliott, § 642.

<sup>11</sup> 17 A. & E. Enc. pp. 1294, 1296; Elliott, §§ 641, 642; Wigmore, § 2363.

<sup>12</sup> Stephens' Dig. p. 535; Wigmore, § 2346.

<sup>13</sup> 23 A. & E. Enc. p. 52; Elliott, § 643; Stephens' Dig. p. 532.

<sup>14</sup> 23 A. & E. Enc. p. 52.

\* See Thayer's Cases, pp. 1107-1184; Wigmore's Cases, pp. 441-525. For current cases supplementing all citations in this section, see 4 Current Law, p. 1968, and subsequent volumes.



## 2. PRIVILEGED COMMUNICATIONS (Cont'd).

(c) **Attorney and client.** Confidential communications<sup>1</sup> by or on behalf of<sup>2</sup> a client to his attorney,<sup>3</sup> made during the existence,<sup>4</sup> and on account<sup>5</sup> of, or with the view of creating,<sup>6</sup> the relation, for the purpose of procuring professional aid or advice,<sup>7</sup> are privileged,<sup>8</sup> and the attorney cannot disclose them, or other information obtained because of such relationship,<sup>9</sup> without the consent of the client<sup>10</sup> or his representative;<sup>14</sup> nor can the client be obliged to disclose them.<sup>11</sup>

The communications of the attorney to the client are also privileged.<sup>12</sup>

Whether or not the communication is within the privilege is a question for the court.<sup>13</sup>

While the attorney can raise the question of privilege, the client or his representatives may waive it.<sup>14</sup> The claim of the privilege warrants no inference.<sup>15</sup>

The privilege does not extend to communications made by the client to secure advice for the commission of a fraud or a crime,<sup>16</sup> or where a disclosure is necessary to protect the attorney.<sup>17</sup> It has also been held not to embrace other miscellaneous matters.<sup>18</sup>

<sup>1</sup> 23 A. & E. Enc. pp. 53, 56, 67, 68-70; 4 Current Law, 1953; Greenl. § 240, 240a, 244-5; Stephens' Dig. p. 538; Wigmore, §§ 2306-2315.

<sup>2</sup> 23 A. & E. Enc. p. 57; Stephens' Dig. p. 538; Wigmore, §§ 2317-2320.

<sup>3</sup> 23 A. & E. Enc. pp. 53, 60, 65, 66; 2 Current Law, p. 2177; Elliott, § 625; Greenl. § 239; Wigmore, §§ 2300-2304.

<sup>4</sup> 23 A. & E. Enc. pp. 58, 63; Elliott, § 625; Greenl. § 244; Stephens' Dig. p. 538. Wigmore, § 2323.

<sup>5</sup> 23 A. & E. Enc. p. 62; Greenl. §§ 237, 244; Stephens' Dig. p. 538.

<sup>6</sup> 23 A. & E. Enc. p. 63; Greenl. § 240.

<sup>7</sup> 23 A. & E. Enc. pp. 53, 60-62; Elliott, §§ 623, 625; Greenl. §§ 240, 241; Wigmore, §§ 2294-2298.

<sup>8</sup> 23 A. & E. Enc. p. 53; Elliott, § 623; Greenl. § 237.

<sup>9</sup> 23 A. & E. Enc. pp. 68, 69; 2 Current Law p. 2177; Greenl. § 237; Wigmore, §§ 2324-2326.

<sup>10</sup> 2 Current Law p. 2176; Stephens' Dig. p. 538.

<sup>11</sup> 23 A. & E. Enc. pp. 53-55; Elliott, § 625; Stephens' Dig. pp. 538, 545; Wigmore, §§ 2324-2326.

<sup>12</sup> 23 A. & E. Enc. p. 56; Elliott, § 625; Stephens' Dig. p. 538; Wigmore, § 2320.

<sup>13</sup> 23 A. & E. Enc. p. 71; Elliott, § 626; Greenl. § 241; Wigmore, § 2322.

<sup>14</sup> 23 A. & E. Enc. pp. 70, 79-83; Elliott, §§ 625, 627; Greenl. § 243; Stephens' Dig. p. 538; Wigmore, §§ 2321-2323, 2327-2329.

<sup>15</sup> 23 A. & E. Enc. p. 58; Wigmore, § 2322.

<sup>16</sup> 23 A. & E. Enc. p. 78; 2 Current Law, p. 2177; Elliott, § 625; Greenl. § 242a; Stephens' Dig. p. 538; Wigmore, § 2298.

<sup>17</sup> 23 A. & E. Enc. p. 79; Elliott, § 623.

<sup>18</sup> 23 A. & E. Enc. pp. 71-79; Greenl. §§ 244, 245; Wigmore, §§ 2306-2310.





## 2. PRIVILEGED COMMUNICATIONS (Cont'd).

(d) **Physician and patient.** At common law communications between a patient and his physician were not privileged<sup>1</sup> but, by statute, in nearly every jurisdiction, such communications are privileged.<sup>2</sup>

(e) **Spiritual advisor and layman.** At common law communications between a layman and his spiritual advisor were not privileged,<sup>3</sup> but, in a number of jurisdictions, such communications, by statute, are privileged.<sup>4</sup>

(f) **Husband and wife.** Communications between husband and wife are privileged,<sup>5</sup> except those occurring in the presence of third persons.<sup>6</sup>

While the privilege is generally confined to communications,<sup>7</sup> it has been held to apply to other information obtained by virtue of the marriage relation.<sup>8</sup>

The privilege continues notwithstanding the termination of the marriage relationship.<sup>9</sup>

At common law the privilege was absolute and could not be waived,<sup>10</sup> but in some jurisdictions it has been held that it may be waived,<sup>11</sup> and in some states the rule has been relaxed where one spouse has injured the other,<sup>12</sup> and in a few other instances.<sup>13</sup>

The rule does not prohibit one who has overheard, or has otherwise come into possession of the communication, from disclosing it.<sup>14</sup>

(g) **Offers of compromise.** Offers to compromise controversies are generally regarded as privileged, and inadmissible in evidence over objection, particularly when such offer was made without prejudice.<sup>15</sup>

<sup>1</sup> 23 A. & E. Enc. p. 83; 4 Current §§ 628, 630; Greenl. § 254; Wigmore, Law, pp. 1954, 1955; Elliott, § 633; § 2337.

Greenl. § 247a; Stephens' Dig. p. 547; <sup>2</sup> 23 A. & E. Enc. p. 95; Elliott, § 630; Wigmore, § 2337.

<sup>3</sup> 23 A. & E. Enc. pp. 83-92; 4 Current Law, pp. 1954, 1955; Elliott, §§ 633-636; Greenl. § 247a; Stephens' Dig. pp. 548-551; Wigmore, §§ 2380-2391. Local statutes should be consulted. <sup>4</sup> 23 A. & E. Enc. p. 98; Elliott, § 630; Greenl. §§ 254, 337-339; Wigmore, § 2341.

<sup>5</sup> 23 A. & E. Enc. p. 92; Elliott, § 637; Greenl. § 247; Stephens' Dig. p. 547; Wigmore, § 2394. <sup>6</sup> 23 A. & E. Enc. p. 98; Elliott, § 632.

<sup>7</sup> 23 A. & E. Enc. p. 92; Elliott, § 637; Greenl. § 247; Stephens' Dig. p. 547; Wigmore, § 2394. <sup>8</sup> 23 A. & E. Enc. p. 98; Elliott, § 632; Greenl. § 254; Wigmore, § 2340.

<sup>9</sup> 23 A. & E. Enc. pp. 92, 93; Elliott, §§ 637, 638; Greenl. § 247; Wigmore, §§ 2394-2396. Consult local statutes. <sup>10</sup> 23 A. & E. Enc. pp. 95, 96; Wigmore, § 2338.

<sup>11</sup> 23 A. & E. Enc. pp. 93-96; Elliott, §§ 628-632; Greenl. §§ 254, 333c-336; Stephens' Dig. p. 528; Wigmore, §§ 2332-2341. <sup>12</sup> 23 A. & E. Enc. pp. 97, 98; Greenl. §§ 254, 343-346.

<sup>13</sup> 23 A. & E. Enc. p. 96; Elliott, § 631; Greenl. § 254; Wigmore, § 2336. <sup>14</sup> 23 A. & E. Enc. pp. 96, 97; Elliott, § 631; Greenl. § 254; Wigmore, § 2339.

<sup>15</sup> 23 A. & E. Enc. pp. 95, 97; Elliott, 1062. <sup>15</sup> 5 Current Law, p. 1340; Elliott, § 646; Greenl. § 192; Wigmore, §§ 1061,



## C. EXAMINATION OF WITNESSES.—1. GENERALLY.\*

A witness is first sworn or affirmed.<sup>1</sup>

He is then examined by the party who called him: this is known as the examination in chief, or the direct examination. The object is to present to the tribunal all the testimony of the witness.<sup>2</sup>

The adversary may then cross-examine him. The object of the cross-examination is to test his credibility, and in general to weaken the force of his testimony.<sup>3</sup> By the weight of authority a cross-examination is only permissible when the witness has been sworn and examined in chief; but in some jurisdictions he may be cross-examined if he has been merely sworn.<sup>4</sup> In a majority of the jurisdictions in the United States the cross-examination is limited to matters brought out in the examination in chief.<sup>5</sup>

The party who called him may then re-examine him. The object of the re-examination is to rehabilitate the witness. New matter should not be introduced.<sup>6</sup> A recross-examination is permitted if new matter be elicited upon the re-examination.<sup>7</sup>

Further examination, and the entire matter of the examination of witnesses, is largely within the discretion of the court.<sup>8</sup>

NOTE. The witnesses of the party having the burden of proof are first examined.<sup>9</sup> Usually, of course, this is the plaintiff. When the plaintiff rests the adverse party then introduces his evidence.<sup>10</sup> The plaintiff then closes.<sup>11</sup>

<sup>1</sup> Elliott, § 805; 8 Enc. P. & P. p. 71; Greenl. §§ 364a-370a; Stephens' Dig. pp. 565-570; Wigmore, §§ 1813-1836. <sup>6</sup> Elliott, §§ 808, 928-938; 8 Enc. P. & P. pp. 123-128; Greenl. §§ 466a-467; Stephens' Dig. pp. 574, 582; Wigmore, §§ 1866, 1896.

<sup>2</sup> Elliott, §§ 803, 804, 808; 8 Enc. P. & P. p. 71; Greenl. § 466a; Stephens' Dig. p. 573; Wigmore, §§ 1866, 1869, 1882, 1883. <sup>7</sup> Elliott, §§ 808, 939; 8 Enc. P. & P. p. 129; Greenl. §§ 466a; Stephens' Dig. p. 582. Wigmore §§ 1866, 1899.

<sup>3</sup> Elliott, §§ 808, 892-894; 8 Enc. P. & P. pp. 71, 98-122; Greenl. §§ 445-449; Stephens' Dig. pp. 573, 592-608; Wigmore, §§ 1866, 1884. <sup>8</sup> Elliott, §§ 808; 811; 8 Enc. P. & P. pp. 71-76, 109, 129, 130; Greenl. §§ 431, 447, 466a; Stephens' Dig. p. 574; Wigmore, §§ 1866, 1867, 1898-1900.

<sup>4</sup> Elliott, §§ 896, 897; 8 Enc. P. & P. pp. 71, 98; Greenl. § 445; Stephens' Dig. p. 573; Wigmore, §§ 1892-1895. <sup>9</sup> Elliott, § 809; 8 Enc. P. & P. p. 131; Wigmore, §§ 1866, 1869-1871.

<sup>5</sup> Elliott, §§ 899-927; 8 Enc. P. & P. pp. 101-122; Greenl. § 445; Stephens' Dig. p. 581; Wigmore, §§ 1885-1891. <sup>10</sup> Elliott, § 809; 8 Enc. P. & P. pp. 131-134; Wigmore, §§ 1866, 1872.

<sup>11</sup> Elliott, § 809; 8 Enc. P. & P. p. 131; Wigmore, §§ 1873-1875.

\* For current cases supplementing all citations in this section, see 5 Current Law, p. 1371, and subsequent volumes. See Thayer's Cases, pp. 1198-1255.



## 2. QUESTIONS IN GENERAL.

Although the testimony offered is not objectionable under the exclusionary rules, still, in its presentation, the following rules should be observed:

**First.** The question should be single.<sup>1</sup>

**Second.** The question should call for, and the answer should consist of, a statement of the facts, and not the conclusions of the witness.<sup>2</sup>

**Third.** The question should not assume a state of facts neither proved nor admitted.<sup>3</sup>

**Fourth.** The answer should be responsive to the question.<sup>4</sup>

**Fifth.** The question asked upon direct or redirect<sup>4a</sup> examination should not be leading,<sup>5</sup> i. e., should not suggest the answer, unless,

The question relates merely to preliminary matters.<sup>6</sup>

The witness is hostile or unwilling.<sup>7</sup>

The witness is immature or otherwise deficient.<sup>8</sup>

Within narrow limits, to aid the witness' memory.<sup>9</sup>

The adverse party is being examined as a witness.<sup>10</sup>

The witness is being examined to prove a contradictory statement of another witness.<sup>11</sup>

A few other exceptions have been recognized, e. g., identification of a person.<sup>12</sup>

The matter of leading questions, however, is largely within the discretion of the court.<sup>13</sup>

A witness may, in the discretion of the court, give his testimony in narrative form.<sup>14</sup>

<sup>1</sup> Elliott, § 830.

<sup>2</sup> Elliott, § 832; 8 Enc. P. & P. pp. 76, 78-80.

<sup>3</sup> Elliott, § 831; 8 Enc. P. & P. p. 77; Greenl. § 434; Wigmore, §§ 771, 780.

<sup>4</sup> Elliott, § 832; 8 Enc. P. & P. p. 134; Wigmore, § 785.

<sup>4a</sup> Stephens' Dig. p. 588.

<sup>5</sup> Elliott, §§ 833-853; 8 Enc. P. & P. pp. 80-85; Greenl. § 434; Stephens' Dig. p. 588; Wigmore, § 769.

<sup>6</sup> Elliott, § 844; 8 Enc. P. & P. p. 92; Greenl. § 434; Wigmore, § 775.

<sup>7</sup> Elliott, § 846; 8 Enc. P. & P. pp. 86, 87; Greenl. § 435; Wigmore, § 774.

<sup>8</sup> Elliott, § 845; 8 Enc. P. & P. pp. 90, 91; Greenl. § 435; Wigmore, § 778.

<sup>9</sup> Elliott, § 847; 8 Enc. P. & P. p. 91; Greenl. § 435; Wigmore, § 777.

<sup>10</sup> Elliott, § 849; 8 Enc. P. & P. p. 87; Greenl. § 435; Wigmore, § 773.

<sup>11</sup> Elliott, § 850; 8 Enc. P. & P. pp. 88, 89; Greenl. § 435; Wigmore, § 779.

<sup>12</sup> Elliott, § 848; 8 Enc. P. & P. p. 92.

<sup>13</sup> Elliott, §§ 842, 843, 852, 853; 8 Enc. P. & P. pp. 83-86; Greenl. § 435; Wigmore, § 770.

<sup>14</sup> 8 Enc. P. & P. pp. 75, 76; Wigmore, § 785.





## 3. REFRESHING RECOLLECTION.\*

A witness, during his examination, may refresh his memory by reference to a writing, providing that, (a) by such reference his memory is so refreshed that he can testify from his own recollection concerning the matters therein recorded,<sup>1</sup> or (b) he remembers having seen the writing before, and, at that time, knowing that it correctly set out the facts,<sup>2</sup> or (c) knowing the writing to be genuine his mind is so convinced thereby that he is enabled to swear positively concerning the matters therein recorded.<sup>3</sup>

If the writing falls within (a) or (b), *supra*, it is immaterial whether it was written by the witness or by some one else; but if within (c), *supra*, it must have been written by the witness himself.<sup>4</sup>

If the writing so refreshes the memory of the witness that he is enabled to testify independently of it, it is immaterial whether or not (a) it was made at or about the time of the occurrence of the transaction recorded,<sup>5</sup> (b) the writing is an original or a copy.<sup>6</sup> In such case the writing does not become evidence.<sup>7</sup>

If the writing does not so refresh the memory of the witness (a) it must have been made at or about the time of the occurrence of the transaction recorded;<sup>8</sup> (b) the original must be produced.<sup>9</sup>

In some cases it has been held that the court may compel a witness to refresh his memory.<sup>10</sup> On the other hand a reference to a memorandum should not be permitted when there is no apparent necessity therefor.<sup>11</sup>

The writing should, upon demand, be submitted to the opponent for inspection and cross-examination.<sup>12</sup>

<sup>1</sup> Elliott, §§ 859, 865-867; 8 Enc. P. & P. pp. 135, 139, 143; Greenl. § 439 a, c; Wigmore, § 758.

<sup>2</sup> Elliott, §§ 859, 865-867; 8 Enc. P. & P. pp. 135, 138-140; Greenl. § 439 a, b; Wigmore, §§ 735-737, 747.

<sup>3</sup> Elliott, § 859 (criticism); 8 Enc. P. & P. p. 135; Wigmore, §§ 737, 747.

<sup>4</sup> Elliott, §§ 865, 866; 8 Enc. P. & P. pp. 138-140; Greenl. § 439 b, c; Stephens' Dig. p. 622; Wigmore, §§ 748, 758, 759.

<sup>5</sup> Elliott, §§ 861-863; Greenl. § 439 c; Wigmore, § 761.

<sup>6</sup> Elliott, § 870; 8 Enc. P. & P. pp. 143; Greenl. § 439 b, c; Stephens' Dig. 760.

<sup>7</sup> Elliott, § 872; 8 Enc. P. & P. pp. 137, 138; Greenl. § 439c; Wigmore, § 745.

<sup>8</sup> Elliott, §§ 861-863; 8 Enc. P. & P. pp. 137, 138; Greenl. § 439b; Wigmore, § 745.

<sup>9</sup> Elliott, §§ 868, 870, 872; 8 Enc. P. & P. pp. 142, 143, 146; Greenl. § 439b, Wigmore, §§ 749, 753, 754.

<sup>10</sup> Elliott, § 858; 8 Enc. P. & P. p. 136.

<sup>11</sup> Elliott, § 858; 8 Enc. P. & P. p. 136.

<sup>12</sup> Elliott, § 871; 8 Enc. P. & P. p. 143; Greenl. § 439 b, c; Stephens' Dig. p. 625; Wigmore, §§ 753, 762.

\* See Thayer's Cases, pp. 1184-1198. For current cases supplementing all citations in this section, see 5 Current Law, p. 1373, and subsequent volumes.



## D. IMPEACHMENT AND CORROBORATION.—1. GENERALLY.\*

A witness of the adverse party may be impeached:

**First.** By evidence of malice, bias, abnormal mental condition, interest, etc.<sup>1</sup>

**Second.** By evidence of prior inconsistent statements,<sup>2</sup> providing a foundation is first laid by directing the attention of the witness to the substance of such prior statement, and to the time when, the place where, and the person to whom, or in whose presence, the statement was made.<sup>3</sup>

If the statement was in writing it must be exhibited to the witness.<sup>4</sup>

Inconsistent conduct may also be shown.<sup>5</sup>

**Third.** By evidence of bad general reputation.<sup>6</sup> Such proof is generally limited to reputation for veracity,<sup>7</sup> but proof of conviction of a crime is, by statute, in nearly every jurisdiction, admitted.<sup>8</sup>

**Fourth.** By disproving his testimony by other witnesses.<sup>9</sup>

**Fifth.** By a cross-examination disclosing lack of knowledge, veracity, impartiality, or credibility.<sup>10</sup>

<sup>1</sup> 30 A. & E. Enc. pp. 1062, 1063, 1088-1096; Elliott, §§ 971, 973; Greenl. §§ 450, 450b; Stephens' Dig. p. 592; Wigmore, §§ 920-969.

<sup>2</sup> 30 A. & E. Enc. pp. 1063, 1104-1118; Elliott, §§ 971, 974-977; Greenl. §§ 461f-465a; Stephens' Dig. pp. 599, 608; Wigmore, §§ 1017-1046.

<sup>3</sup> 30 A. & E. Enc. pp. 1119-1128; Elliott, § 974; Greenl. §§ 462-462b; Stephens' Dig. p. 599; Wigmore, §§ 1025-1039.

<sup>4</sup> 30 A. & E. Enc. p. 1122; Elliott, § 976; Greenl. §§ 463-465a; Stephens' Dig. p. 608; Wigmore, §§ 1259-1261 (criticism of this rule).

<sup>5</sup> 30 A. & E. Enc. p. 1118; Elliott, § 975; Greenl. § 462a; Wigmore, §§ 1040, 1042, 1043.

<sup>6</sup> 30 A. & E. Enc. pp. 1063, 1074-1084; Elliott, §§ 971, 978-980; Greenl. §§ 461a-d; Stephens' Dig. pp. 597, 610; Wigmore, §§ 920-940, 977-996.

<sup>7</sup> 30 A. & E. Enc. pp. 1074, 1075; Elliott, §§ 971, 978-980; Greenl. §§ 461a, b; Wigmore, §§ 922, 923.

<sup>8</sup> 30 A. & E. Enc. pp. 1085-1088; Elliott, §§ 981-984; Greenl. § 461b; Stephens' Dig. p. 597; Wigmore, §§ 926, 980.

<sup>9</sup> 30 A. & E. Enc. pp. 1063, 1103; Elliott, §§ 970, 971; Greenl. § 461, e; Wigmore, §§ 1000-1015.

<sup>10</sup> 30 A. & E. Enc. pp. 1063, 1097-1102; Elliott, § 973; Greenl. §§ 450, 461 b, c; Stephens' Dig. p. 592; Wigmore, §§ 944, 981-983, 993-996.

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\* See Wigmore's Cases, pp. 107-133, 156-158. For current cases supplementing all citations in this section, see 4 Current Law, p. 1958, and subsequent volumes.



## 2. IMPEACHMENT OF ONE'S OWN WITNESS.

A party who, voluntarily, produces and examines a witness, cannot subsequently impeach such witness, either by proof of his general reputation,<sup>1</sup> or, generally, by proof that he has made prior statements inconsistent with his testimony.<sup>2</sup>

He may, however, disprove the testimony of the witness by other evidence.<sup>3</sup>

Concerning impeachment, by proof of malice, bias, interest, etc., the authorities are divided, but generally impeachment of this sort is not permitted.<sup>4</sup>

The rule prohibiting the impeachment of a party's own witness does not apply to a witness called because of necessity, e. g., a subscribing witness.<sup>5</sup>

So, by the weight of authority, where a party is entrapped by a hostile witness, his prior inconsistent statements may be proved.<sup>6</sup>

The rule prohibiting the impeachment of one's own witness does not apply where the purpose of putting the witness on the stand is to prove his fraud.<sup>7</sup>

<sup>1</sup> 30 A. & E. Enc. pp. 1128, 1133, 1134; Elliott, § 985; Greenl. § 442; Wigmore, §§ 896-900.

<sup>2</sup> 30 A. & E. Enc. pp. 1128, 1133, 1134; Elliott, § 985; Greenl. § 444 (eight views); Wigmore, §§ 902-906 (eight views).

<sup>3</sup> 30 A. & E. Enc. pp. 1129, 1133, 1134; Elliott, § 985; Greenl. § 443b; Wigmore, §§ 907, 908.

<sup>4</sup> Greenl. § 443a; Wigmore, § 901.

<sup>5</sup> 30 A. & E. Enc. pp. 1132, 1133; Elliott, § 987; Greenl. § 443; Wigmore, § 917.

<sup>6</sup> 30 A. & E. Enc. pp. 1130-1132; Greenl. § 444; Wigmore, § 904.

<sup>7</sup> 30 A. & E. Enc. pp. 1128, 1129.



## 3. CORROBORATION.

After an attempt to impeach the credibility of a witness, he may be corroborated,<sup>1</sup> as follows:

**First.** Explanations or denials are admissible where an attempt has been made to impeach by evidence of bias, interest, etc.<sup>2</sup>

**Second.** Corroboration by evidence of prior consistent statements,

(a) is, in some jurisdictions, permitted when the impeachment was by evidence of bias, etc.;<sup>3</sup>

(b) is in some jurisdictions permitted when the impeachment was by evidence of prior inconsistent statements, but the weight of authority appears to be contra;<sup>4</sup>

(c) is, as a rule, not permitted when the impeachment was by evidence of bad reputation, although there are authorities contra;<sup>5</sup>

(d) is, as a rule, not permitted when the impeachment was by evidence of contradicting witnesses, although there are authorities contra;<sup>6</sup>

(e) is generally not permitted when the impeachment was by means of a cross-examination.<sup>7</sup>

Such evidence is, with very few exceptions, held inadmissible where the witness is a party.<sup>8</sup>

**Third.** Corroboration by evidence of good character,

(a) is generally not permitted when the impeachment was by evidence of bias, etc.;<sup>9</sup>

(b) is frequently permitted when the impeachment was by evidence of prior inconsistent statements, although upon this point the authorities are divided;<sup>10</sup>

(c) is always permitted where the impeachment was by a direct attack on character;<sup>11</sup>

(d) is generally not permitted where the impeachment was by contradiction by other witnesses;<sup>12</sup>

(e) is generally permitted where the impeachment was by means of a cross-examination, but the authorities are divided upon this proposition.<sup>13</sup>

**Fourth.** Corroboration by other evidence is of course always permitted.<sup>14</sup>

<sup>1</sup> 30 A. & E. Enc. p. 1141; Greenl. § 467; Wigmore, § 1104.

<sup>2</sup> 30 A. & E. Enc. p. 1143; Wigmore, § 1119.

<sup>3</sup> 30 A. & E. Enc. p. 1148; Elliott, § 994; Greenl. § 469b; Wigmore, § 1128.

<sup>4</sup> 30 A. & E. Enc. pp. 1146, 1147; Greenl. § 469b; Wigmore, § 1126.

<sup>5</sup> Greenl. § 469b; Wigmore, § 1125.

<sup>6</sup> 30 A. & E. Enc. p. 1146; Greenl. § 469b; Wigmore, § 1127.

<sup>7</sup> Greenl. § 469b; Wigmore, § 1131.

<sup>8</sup> 30 A. & E. Enc. p. 1149; Wigmore, § 1133.

<sup>9</sup> 30 A. & E. Enc. p. 1150; Greenl. § 469a; Wigmore, § 1107.

<sup>10</sup> 30 A. & E. Enc. p. 1150; Elliott, § 995; Greenl. § 469a; Wigmore, § 1108.

<sup>11</sup> 30 A. & E. Enc. pp. 1142, 1143, 1149, 1150, 1152; Elliott, § 995; Greenl. § 469a; Wigmore, §§ 1105, 1106.

<sup>12</sup> 30 A. & E. Enc. 1150, 1151; Elliott, § 995; Greenl. § 469a; Wigmore, § 1109.

<sup>13</sup> Greenl. § 469a.

<sup>14</sup> 30 A. & E. Enc. §§ 1141, 1142.





## E. DEPOSITIONS.

“As testimony grew to be more important in jury cases, it was more and more necessary to provide against the loss of it by death and other causes. The chancery had dealt with this by following the example of the Roman law and taking depositions *de bene esse* and *in perpetuum*. And the common-law courts, under some pressure, as it would seem, from the chancery, admitted the use of depositions so taken, in case of death and certain other contingencies, in order to save what might be a fatal loss of testimony.”<sup>1</sup>

The subject of depositions is one everywhere regulated by statute; consequently the local statutes should be consulted.<sup>2</sup>

## F. PERSONAL KNOWLEDGE.

That of which a witness has personal knowledge (*supra* page 2) is admissible as evidence, if it is relevant and material; but “self serving declarations”<sup>3</sup> are generally excluded, although these are sometimes admitted under the exceptions concerning *res gesta* (*infra* p. 18), and account books of a party (*infra* p. 25), and in some cases, they are admissible under other of the exceptions to the rule against hearsay.

<sup>1</sup> Thayer's *Cas.* p. 314. See, also, 9 A. Greenl. §§ 320-325; Stephens' *Dig.* pp. & E. Ency. pp. 298, 299; Elliott, § 1130; 629-637; Wigmore, §§ 1411, 1412. Greenl. § 320; Wigmore, § 1417.

<sup>2</sup> 9 A. & E. Enc. p. 5; Elliott, § 329.

<sup>3</sup> 9 A. & E. Enc. pp. 297-365; 5 Cur. 992; Stephens' *Dig.* p. 115. *rent Law*, p. 988; Elliott, §§ 1129-1200;



## G. HEARSAY.—I. GENERALLY.\*

Evidenec, the probative value of which does not depend solely upon the credit to be given to the witness himself, but which depends, also, in part, upon the competency and veracity of some other person, is termed hearsay.<sup>1</sup>

The hearsay rule applies to written as well as to oral statements.<sup>2</sup>

The hearsay rule does not apply to words considered as facts; that is when the question is merely whether a statement was made, and not whether it was true or false.<sup>3</sup>

Hearsay evidence is admissible<sup>4</sup> if embraced within the exceptions to the rule hereinafter specified.

<sup>1</sup> 15 A. & E. Enc. p. 309; Elliott, §§ 314, 316, 317; Greenl. § 99; Stephens' Dig. p. 96; Wigmore, §§ 1361-1365, 1768.      \* 15 A. & E. Enc. pp. 314, 315; Elliott, §§ 322-328; Greenl. §§ 100, 101, 108-110a; Wigmore, §§ 1361, 1768.

<sup>2</sup> 15 A. & E. Enc. p. 310; Elliott, § 314; Greenl. § 99; Stephens' Dig. p. 96; Wigmore, §§ 1361-1365.      <sup>4</sup> 15 A. & E. Enc. pp. 309, 310; Elliott, § 315; Greenl. §§ 99, 99a; Stephens' Dig. p. 96; Wigmore, §§ 1361-1365.

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\* See Thayer's Cases, pp. 306-312; Wigmore's Cases, pp. 271-289, 360-371. For current cases supplementing all citations in this section, see 5 Current Law, p. 1328, and subsequent volumes.



## 2. ADMISSIONS.\*

Evidence of statements, conduct, and in some cases of the silent acquiescence,<sup>1</sup> of a party to the record, or of his agent, his predecessor in interest, or of one jointly interested with him,<sup>2</sup> is admissible against such party,<sup>3</sup> providing that the admission of the agent is made during, and is within the scope of his agency,<sup>4</sup> and the admission of the predecessor in interest or of the one jointly interested, is made during and concerning that interest.<sup>5</sup>

The admission of a merely nominal party is not admissible against the real party.<sup>6</sup>

Nor is the admission of a prior holder of a negotiable instrument admissible against an assignee for value, who receives it before maturity without notice thereof.<sup>7</sup>

<sup>1</sup> 1 A. & E. Enc. pp. 670-674; Elliott, §§ 221, 225, 230, 231; Greenl. §§ 195a-199; Wigmore, §§ 1071-1075.

<sup>2</sup> 1 A. & E. Enc. pp. 703-712; Elliott, §§ 246-251; Greenl. §§ 174-179; Wigmore, §§ 1076, 1077.

<sup>3</sup> 1 A. & E. Enc. pp. 675-722; Elliott, §§ 220-270; Greenl. §§ 169-199; Stephens' Dig. pp. 103-144; Wigmore, §§ 1048, 1069-1087.

<sup>4</sup> 1 A. & E. Enc. pp. 690-698; Greenl. §§ 184 c, d; Elliott, §§ 252-258; Stephens' Dig. pp. 124-141; Wigmore, § 1078.

<sup>5</sup> 1 A. & E. Enc. pp. 680-689, 703-712; Elliott, §§ 261-270; Greenl. §§ 189-191; Stephens' Dig. pp. 116-124; Wigmore, §§ 1080-1083.

<sup>6</sup> 1 A. & E. Enc. p. 678; Elliott, §§ 243, 244, 262; Greenl. §§ 172, 173; Stephens' Dig. p. 116 (contra); Wigmore, § 1076.

<sup>7</sup> 1 A. & E. Enc. 685, 686, note; Elliott, § 265; Greenl. §§ 171, 190; Wigmore, § 1084.

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\* See Thayer's Cases, pp. 111-134; Wigmore's Cases, pp. 134-148. For current cases supplementing all citations in this section, see 5 Current Law, p. 1335, and subsequent volumes.



## 3. CONFESSIONS.\*

Evidence of a confession of guilt by a party accused of a crime is admissible against him in a criminal case, if it was made voluntarily,<sup>1</sup> i. e., if it was not caused by any inducement, threat or promise<sup>2</sup> with reference to the case<sup>3</sup> proceeding from one in authority therein.<sup>4</sup>

Whether or not the confession was voluntary is a question for the court.<sup>5</sup>

After a conspiracy is established by other evidence, the act or declaration of one of the conspirators, during the pendency, or at the time of the commission of the unlawful act and in furtherance of the unlawful enterprise, is admissible against his fellow conspirators.<sup>6</sup>

<sup>1</sup> 6 A. & E. Enc. pp. 521-528, 569-573; Elliott, §§ 271-273, 276, 285-294; Greenl. §§ 213, 219, 233, 234; Stephens' Dig. p. 146; Wigmore, §§ 815-822.

<sup>2</sup> 6 A. & E. Enc. pp. 527-544; Elliott, §§ 278-280, 283, 284; Greenl. §§ 219a, 220, 221, 224-226; Stephens' Dig. pp. 150-152, 157-159; Wigmore, §§ 824-826, 831-855.

<sup>3</sup> 6 A. & E. Enc. p. 533; Elliott, § 284; Stephens' Dig. p. 150.

<sup>4</sup> 6 A. & E. Enc. pp. 544-551; Elliott, §§ 281, 282; Greenl. §§ 222, 223; Stephens' Dig. pp. 150, 151; Wigmore, §§ 827-830. (In sec. 830 it is stated that there are three rules in U. S.)

<sup>5</sup> 6 A. & E. Enc. p. 554; Elliott, §§ 275, 277; Greenl. § 219b; Stephens' Dig. p. 150; Wigmore, § 861.

<sup>6</sup> 6 A. & E. Enc. p. 571; Elliott, § 289; Greenl. § 233; Stephens' Dig. p. 31.

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\* See Thayer's Cases, pp. 285-306; Wigmore's Cases, pp. 149-155. For current cases supplementing all citations in this section, see 5 Current Law, p. 1822, and subsequent volumes.





## 4. RES GESTA.\*

Exclamations and spontaneous or impulsive statements closely accompanying and connected with<sup>1</sup> an admissible fact<sup>2</sup> and interpreting, or explaining it,<sup>3</sup> are admissible in evidence.\*

<sup>1</sup> 24 A. & E. Enc. pp. 664, 665; Elliott, § 537; Greenl. §§ 108, 162f, 162g; Elliott, §§ 536-539, 541, 542; Greenl. §§ 108, 162g; Wigmore, §§ 1756, 1776.

<sup>2</sup> 24 A. & E. Enc. p. 663; Elliott, §§ 537, 538, 539-561; Greenl. §§ 108, 537, 539-541; Greenl. § 108; Wigmore, 162f; Stephens' Dig. p 48; Wigmore, §§ 1753, 1773.

<sup>3</sup> 24 A. & E. Enc. pp. 663, 666; El-

liott, § 537; Greenl. §§ 108, 162f, 162g; Wigmore, §§ 1754, 1774, 1775.

<sup>4</sup> 24 A. & E. Enc. pp. 661-667; Elliott, §§ 1772-1797.

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\* See Thayer's Cases, pp. 641-672; Wigmore's Cases, pp. 358-359. For current cases supplementing all citations in this section, see 5 Current Law, p. 1332, and subsequent volumes.



## 5. DECLARATIONS INDICATING THE INTENTION, OR THE PHYSICAL OR MENTAL CONDITION OF THE DECLARANT.\*

Declarations, indicating the intention<sup>1</sup> or the physical<sup>2</sup> or mental condition<sup>3</sup> of the declarant, are admissible.

The declarations bearing upon physical condition must be concerning the present<sup>4</sup> and internal<sup>5</sup> condition. Concerning statements made to a physician, various views have been adopted.<sup>6</sup>

The declarations concerning mental condition or intention must relate to a present existing state of mind.<sup>7</sup>

<sup>1</sup> 24 A. & E. Enc. pp. 672-675; Elliott, §§ 518-521, 531-533; Greenl. §§ 162 a, c, e; Stephens' Dig. pp. 80, 183; Wigmore, §§ 1714, 1725-1740.

<sup>2</sup> 24 A. & E. Enc. pp. 667-671; Elliott, §§ 518-521, 523; Greenl. §§ 162a, 162b; Stephens' Dig. p. 80; Wigmore, §§ 1714, 1718-1723.

<sup>3</sup> 24 A. & E. Enc. pp. 672-675; Elliott, §§ 518-521, 529, 530; Greenl. §§ 162 a, d, e; Stephens' Dig. pp. 80, 183; Wigmore, §§ 1714, 1725-1740.

<sup>4</sup> 24 A. & E. Enc. pp. 667-671; Elliott, §§ 518-521, 523; Greenl. §§ 162a, 162b; Stephens' Dig. p. 80; Wigmore, §§ 1714, 1718-1723.

<sup>5</sup> Elliott, § 525; Greenl. § 162b; Wigmore, § 1722.

<sup>6</sup> 24 A. & E. Enc. pp. 669-671; Elliott, §§ 527, 528; Greenl. § 162b; Wigmore, §§ 1719, 1720, 1722.

<sup>7</sup> 24 A. & E. Enc. pp. 672-675; Elliott, §§ 529-531; Wigmore, §§ 1725, 1726, 1732 (4).

\* See Thayer's Cases, pp. 587-641; Wigmore's Cases, pp. 348-357. For current cases supplementing all citations in this section, see 5 Current Law, p. 1332, and subsequent volumes.



## 6. DECLARATIONS AGAINST INTEREST.\*

Evidence of declarations or entries of a deceased person<sup>1</sup> against his pecuniary or proprietary interest,<sup>2</sup> is admissible if he had, or can be presumed to have had, knowledge of the matter.<sup>3</sup>

If the declaration or entry is, in part only, against interest, and also contains other matter, the whole is nevertheless admissible,<sup>4</sup> particularly if the portion against interest preponderates.<sup>5</sup>

Evidence of a declaration or entry against interest is admissible for or against any one, whether represented by the declarant or not.<sup>6</sup>

<sup>1</sup> 9 A. & E. Enc. pp. 8, 9; Elliott, §§ 434, 436, 439, 443; Greenl. § 147; Stephens' Dig. p. 161; Wigmore, § 1456 (adds absence and insanity).

<sup>2</sup> 9 A. & E. Enc. p. 9; Elliott, §§ 434-436, 440, 441, 444, 445; Greenl. §§ 147-149, 150-152d; Stephens' Dig. pp. 161, 177; Wigmore, §§ 1455, 1457-1469, 1476, 1477.

<sup>3</sup> 9 A. & E. Enc. pp. 8, 9; Elliott, §§ 436, 439, 446; Greenl. §§ 147, 153;

Stephens' Dig. p. 177; Wigmore, § 1471 (states that the knowledge required is merely that of the ordinary witness).

<sup>4</sup> Elliott, § 447; Greenl. § 152; Stephens' Dig. p. 177; Wigmore, § 1465.

<sup>5</sup> Elliott, § 442; Greenl. § 151; Wigmore, § 1464.

<sup>6</sup> 9 A. & E. Enc. p. 8; Elliott, §§ 434, 435.

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\* See Thayer's Cases, pp. 474-507; Wigmore's Cases, pp. 293, 294. For current cases supplementing all citations in this section, see 5 Current Law, p. 1335, and subsequent volumes.



## 7. DYING DECLARATIONS.\*

Dying declarations<sup>1</sup> are admissible in criminal cases of homicide,<sup>2</sup> if the circumstances of the death are the subject of the declaration,<sup>3</sup> and the death of the declarant is the subject of the charge;<sup>4</sup> providing the declaration was made when he was mortally ill,<sup>5</sup> and conscious of impending death.<sup>6</sup>

<sup>1</sup> 10 A. & E. Enc. pp. 360, 361; Elliott, §§ 332, 335, 337, 347; Greenl. Elliott, §§ 334, 341-346; Greenl. §§ 156, § 156a; Stephens' Dig. p. 163; Wig- 159b-161; Stephens' Dig. p. 163; Wig- more, § 1433.

<sup>2</sup> 10 A. & E. Enc. pp. 370-374; Elliott, §§ 333, 335; Greenl. §§ 156, 156a; Stephens' Dig. p. 163; Wigmore, § 1438.

<sup>3</sup> 10 A. & E. Enc. pp. 360, 361; Elliott, §§ 332, 333, 335, 336; Greenl. § 156a; Stephens' Dig. p. 163; Wigmore, § 1434.

<sup>4</sup> 10 A. & E. Enc. pp. 360, 361, 373;

<sup>5</sup> 10 A. & E. Enc. pp. 361, 364, 366; Elliott, §§ 333, 335; Greenl. §§ 156, 156a; Stephens' Dig. p. 163; Wigmore, § 1438.

<sup>6</sup> 10 A. & E. Enc. pp. 360, 364-369, 386-390; Elliott, §§ 332, 333, 335, 348 163; Wigmore, §§ 1439-1442.

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\* See Thayer's Cases, pp. 349-371; Wigmore's Cases, pp. 291, 292. For current cases supplementing all citations in this section, see 5 Current Law, p. 1719, and subsequent volumes.





## 8. DECLARATIONS CONCERNING PEDIGREE.\*

Declarations concerning descent, relationship, birth, marriage, or death,<sup>1</sup> by one legitimately related by blood or marriage to the family concerning which the declaration is made,<sup>2</sup> are admissible, if based upon the declarant's own knowledge,<sup>3</sup> family rumor,<sup>4</sup> or information received from one qualified to be the declarant,<sup>5</sup> providing the declaration was made *ante litem motam*<sup>6</sup> and the declarant is dead.<sup>7</sup>

In addition to the matters specified, declarations relating to other matters have sometimes been held to be concerning pedigree.<sup>8</sup>

The fact of the requisite relationship of the declarant must be established, by evidence other than his declaration, before the declaration becomes admissible.<sup>9</sup>

In many jurisdictions such declarations are admissible only in cases where the matter of pedigree, to which they relate, is directly in issue.<sup>10</sup>

<sup>1</sup> 22 A. & E. Enc. p. 640; Elliott, §§ 360, 361, 370, 373, 375-378; Greenl. §§ 114d, 114f; Stephens' Dig. p. 189; Wigmore, §§ 1480, 1500-1502.

<sup>2</sup> 22 A. & E. Enc. pp. 641-644; Elliott, §§ 361, 364, 366, 367; Greenl. § 114c; Stephens' Dig. p. 190; Wigmore, §§ 1489-1492.

<sup>3</sup> 22 A. & E. Enc. p. 644; Elliott, § 371; Stephens' Dig. p. 189; Wigmore, §§ 1480, 1486, 1487.

<sup>4</sup> 22 A. & E. Enc. pp. 644, 650; Elliott, § 371; Greenl. § 114c; Wigmore, §§ 1480, 1486, 1487.

<sup>5</sup> 22 A. & E. Enc. p. 644; Elliott, § 371; Stephens' Dig. p. 189; Wigmore, §§ 1486, 1487.

<sup>6</sup> 22 A. & E. Enc. pp. 645, 646; Elliott, §§ 361, 369, 372; Greenl. § 114e; Stephens' Dig. p. 190; Wigmore, §§ 1483, 1484.

<sup>7</sup> 22 A. & E. Enc. p. 644; Elliott, §§ 361, 364, 365, 380; Greenl. §§ 114b, 114c; Stephens' Dig. p. 161; Wigmore, § 1481 (states that unavailability is sufficient).

<sup>8</sup> 22 A. & E. Enc. pp. 646-649; Elliott, §§ 360, 375-378.

<sup>9</sup> 22 A. & E. Enc. p. 643; Elliott, §§ 380, 381; Wigmore, § 1490.

<sup>10</sup> 22 A. & E. Enc. p. 646; Elliott, § 370, 374; Greenl. § 114g; Stephens' Dig. p. 190; Wigmore, § 1503.

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\* See Thayer's Cases, pp. 371-406; Wigmore's Cases, pp. 295-299. For current cases supplementing all citations in this section, see 5 Current Law, p. 1328, and subsequent volumes.



## 9. DECLARATIONS CONCERNING MATTERS OF PUBLIC OR GENERAL INTEREST.\*

Declarations made *ante litem motam*,<sup>1</sup> expressing general reputation or opinion<sup>2</sup> concerning matters of public<sup>3</sup> or general interest<sup>4</sup> are admissible, if the declarant is, or is supposed to be,<sup>5</sup> dead.<sup>6</sup>

The "interest" necessary is a pecuniary one, or one affecting legal rights or liabilities;<sup>7</sup> it is not sufficient that the matter is interesting.<sup>8</sup>

In matters of general interest it must appear that the declarant had opportunity for knowledge concerning the matter;<sup>9</sup> but, in matters of public interest, it is sufficient if it appears that the declarant was a member of the community.<sup>10</sup>

In the United States such declarations are also admitted concerning private boundaries,<sup>11</sup> and in some jurisdictions, individual declarations concerning private boundaries have been received.<sup>12</sup>

It is not necessary that the witness should be able to state who made the declaration.<sup>13</sup>

<sup>1</sup> 9 A. & E. Enc. pp. 9, 11; Elliott, §§ 385, 387, 389; Greenl. §§ 131-133, 139; Stephens' Dig. pp. 185, 190; Wigmore, § 1588.

<sup>2</sup> Elliott, §§ 387, 390; Greenl. § 138; Stephens' Dig. p. 185; Wigmore, §§ 1584, 1585, 1612, 1617, 1618.

<sup>3</sup> 9 A. & E. Enc. pp. 9, 10; Elliott, §§ 384, 387, 388, 395; Greenl. § 128; Stephens' Dig. p. 185; Wigmore, §§ 1580, 1586.

<sup>4</sup> 9 A. & E. Enc. pp. 9, 10; Elliott, §§ 384, 387, 388, 395; Greenl. § 128; Stephens' Dig. p. 185; Wigmore, §§ 1580, 1586, 1598.

<sup>5</sup> 9 A. & E. Enc. pp. 9, 11; Elliott, §§ 387, 393; Greenl. § 130.

<sup>6</sup> 9 A. & E. Enc. pp. 9, 11; Elliott, §§ 387, 393; Greenl. § 130; Stephens' Dig. p. 161; Wigmore, §§ 1582 (3), 1584.

<sup>7</sup> 9 A. & E. Enc. p. 10; Elliott, § 384.

<sup>8</sup> 9 A. & E. Enc. p. 10.

<sup>9</sup> 9 A. & E. Enc. p. 11; Elliott, §§ 387, 391; Greenl. § 128a; Wigmore, §§ 1591, 1619.

<sup>10</sup> 9 A. & E. Enc. p. 11; Elliott, §§ 387, 392; Greenl. §§ 128, 128a.

<sup>11</sup> Elliott, §§ 398, 401, 402; Greenl. § 138a; Wigmore, § 1587.

<sup>12</sup> Elliott, § 403; Greenl. § 140a.

<sup>13</sup> 9 A. & E. Enc. p. 11; Greenl. § 135.

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\* See Thayer's Cases, pp. 406-428; Wigmore's Cases, pp. 312-322. For current cases supplementing all citations in this section, see 5 Current Law, p. 1323, and subsequent volumes.



## 10. REPORTED TESTIMONY AND CERTAIN DECLARATIONS UNDER OATH.\*

Testimony given at a former trial,<sup>1</sup> which involved substantially the same issues,<sup>2</sup> and was between the same parties,<sup>3</sup> or their predecessors in interest,<sup>4</sup> is admissible, if such witness is dead,<sup>5</sup> insane,<sup>6</sup> permanently or indefinitely beyond the jurisdiction of the court,<sup>7</sup> kept out of the way by the adverse party,<sup>8</sup> unable to attend the trial,<sup>9</sup> or cannot be found,<sup>10</sup> or since the former trial has become disqualified by interest or infamy,<sup>11</sup> providing that the party against whom the testimony is offered, or his predecessor in interest, had the right and opportunity to cross-examine such witness.<sup>12</sup>

Such testimony is subject to the same objections and conditions as if the witness were testifying in person.<sup>13</sup>

<sup>1</sup> 11 A. & E. Enc. p. 523; Elliott, §§ 495, 507, 513-517; Greenl. §§ 163, 163a; Stephens' Dig. p. 194; Wigmore, §§ 1401-1418.

<sup>2</sup> 11 A. & E. Enc. p. 523, 526; Elliott, §§ 495, 509; Greenl. § 163a; Stephens' Dig. p. 195; Wigmore, §§ 1386, 1387.

<sup>3</sup> 11 A. & E. Enc. p. 523, 526; Elliott, §§ 495, 508; Greenl. §§ 163, 163a; Stephens' Dig. p. 195; Wigmore, § 1386.

<sup>4</sup> 11 A. & E. Enc. p. 526; Elliott, §§ 495, 508; Greenl. § 163a; Stephens' Dig. p. 195; Wigmore, § 1388.

<sup>5</sup> 11 A. & E. Enc. p. 523; Elliott, §§ 495, 498, 499; Greenl. §§ 163, 163g; Stephens' Dig. p. 194; Wigmore, § 1403.

<sup>6</sup> 11 A. & E. Enc. p. 524; Elliott, §§ 495, 498, 500; Greenl. §§ 163, 163g; Stephens' Dig. p. 194; Wigmore, § 1408.

<sup>7</sup> 11 A. & E. Enc. p. 525; Elliott, §§ 495, 498; Greenl. §§ 163, 163g; Stephens' Dig. p. 195; Wigmore, § 1404.

<sup>8</sup> 11 A. & E. Enc. p. 525; Elliott, §§ 495, 498; Greenl. §§ 163, 163g; Stephens' Dig. p. 195; Wigmore, § 1405.

<sup>9</sup> 11 A. & E. Enc. p. 524; Elliott, § 500; Greenl. § 163g; Stephens' Dig. p. 194; Wigmore, § 1406.

<sup>10</sup> Elliott, § 500; Greenl. §§ 163, 163g; Stephens' Dig. p. 195; Wigmore, § 1405.

<sup>11</sup> 11 A. & E. Enc. p. 524; Elliott, § 500; Greenl. § 163g; Wigmore, §§ 1409, 1410.

<sup>12</sup> 11 A. & E. Enc. p. 526; Elliott, §§ 495, 506, 507; Greenl. §§ 163, 163a; Stephens' Dig. p. 195; Wigmore, §§ 1386-1389.

<sup>13</sup> 11 A. & E. Enc. p. 527; Elliott, §§ 504, 505; Greenl. § 163.

\* See Thayer's Cases, pp. 315-349. For current cases supplementing all citations in this section, see 5 Current Law, p. 1352, and subsequent volumes.



## 11. ACCOUNT BOOKS OF PARTIES TO THE LITIGATION.\*

The account books of a party to the litigation are admissible,<sup>1</sup> if they are books of original entry,<sup>2</sup> are regular and continuous,<sup>3</sup> and the entries were made at or near the time of the occurrence of the transaction recorded,<sup>4</sup> providing the entrant had personal knowledge of the matter recorded,<sup>5</sup> and the entries are verified by his oath,<sup>6</sup> or by proof of his handwriting, in case he is dead or inaccessible.<sup>7</sup>

In case the information concerning the transaction recorded is furnished to the entrant by some one else, proof of the correctness of the entry by the party having personal knowledge thereof is generally required.<sup>8</sup>

Such books are admissible only to prove such matters as are properly and usually so recorded,<sup>9</sup> and in some jurisdictions such entries are only admissible in proof of small amounts.<sup>10</sup>

<sup>1</sup> 9 A. & E. Enc. pp. 903, 904, 928, Elliott, §§ 455, 462; Greenl. § 120c; Wigmore, 936, 937; Elliott, §§ 454-456, 459, 463, more, § 1555.

464; Greenl. §§ 120b, 120c; Wigmore, <sup>6</sup> 9 A. & E. Enc. pp. 904, 919; Elliott, § 470; Greenl. § 120c; Wigmore, § 1536-1561.

<sup>2</sup> 9 A. & E. Enc. pp. 918-922; Elliott, 1554.  
<sup>3</sup> §§ 455, 460; Greenl. § 120c; Wigmore, <sup>7</sup> Elliott, §§ 465, 470.  
<sup>4</sup> § 1558.

<sup>5</sup> 9 A. & E. Enc. pp. 917, 918, 922, Elliott, § 462; Greenl. § 120c; Wigmore, 925-927; Elliott, § 454; Greenl. § 120c; § 1555.  
Wigmore, §§ 1546-1549.

<sup>6</sup> 9 A. & E. Enc. pp. 922, 923; Elliott, § 467; Greenl. § 120c; Wigmore, §§ 455, 461; Greenl. § 120c; Wigmore, 1539-1541.

§ 1550. <sup>10</sup> Elliott, § 469; Greenl. § 120c; Wigmore, § 1543.

<sup>9</sup> 9 A. & E. Enc. pp. 919, 924, 925; Elliott, § 1543.

\* Thayer's Cas. pp. 507-544; Wigmore's Cas. pp. 301-306. Consult local statutes.





12. ENTRIES AND DECLARATIONS OF THIRD PARTIES MADE IN THE REGULAR COURSE OF DUTY OR BUSINESS.\*

Entries and declarations in writing<sup>1</sup> made by a third person in the course of duty<sup>2</sup> or business<sup>3</sup> are admissible, if they were made at or near the time of the occurrence of the fact recorded,<sup>4</sup> and if the entrant had knowledge thereof,<sup>5</sup> providing he is dead,<sup>6</sup> and in some jurisdictions if insane or out of the jurisdiction.<sup>7</sup>

A prerequisite to the admissibility of such entries or declarations is the proof of the handwriting of the maker thereof.<sup>8</sup>

The entry must not be casual or isolated, but must be one of a number of regular entries.<sup>9</sup>

<sup>1</sup> Elliott, §§ 477, 479, 480, 482, 483, 493 (written or oral in England); Stephens' Dig. p. 168; Wigmore, § Greenl. § 120a; Wigmore, §§ 1517, 1518, 1530.

1528, 1531.

<sup>2</sup> Elliott, §§ 476, 479, 480, 485; Greenl. § 120a; Stephens' Dig. p. 168; Wigmore, § 1524.

<sup>3</sup> 9 A. & E. Enc. p. 933; Elliott, §§ 476, 479, 480, 485, 491; Greenl. § 120a; Stephens' Dig. p. 168; Wigmore, § 1523.

<sup>4</sup> 9 A. & E. Enc. p. 938; Elliott, §§ 476, 480, 487; Greenl. § 120a; Stephens' Dig. p. 168; Wigmore, § 1526.

<sup>5</sup> Elliott, §§ 489, 490; Greenl. § 120a; Stephens' Dig. p. 168; Wigmore, §

<sup>6</sup> 9 A. & E. Enc. p. 939; Elliott, §§ 476, 477, 480, 488; Greenl. § 120a; Stephens' Dig. p. 161; Wigmore, § 1521.

<sup>7</sup> 9 A. & E. Enc. p. 939; Elliott, § 488; Greenl. § 120a; Wigmore, § 1521.

<sup>8</sup> Elliott, § 494.

<sup>9</sup> Elliott, § 486; Greenl. § 120a; Wigmore, § 1525.

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\* Thayer's Cas. pp. 544-587; Wigmore's Cas. pp. 307-311.



## 13. PUBLIC DOCUMENTS.\*

Documents kept by a public officer,<sup>1</sup> in the course of his official duty,<sup>2</sup> subject to public inspection,<sup>3</sup> and coming from proper custody,<sup>4</sup> are admissible in evidence.<sup>5</sup>

Duly authenticated copies of public documents are equivalent to the originals.<sup>6</sup>

Under this rule certain documents of a quasi public nature,<sup>7</sup> e. g., histories, scientific books, almanacs, mortality tables, market reports, etc., are generally regarded as admissible.

<sup>1</sup> 9 A. & E. Enc. p. 880; Elliott, §§ 404-405, 408; Wigmore, § 1633 (8). Dig. pp. 205, 389; Wigmore, §§ 1630, 1631.

<sup>2</sup> 9 A. & E. Enc. 880; Elliott, §§ 404-406; Greenl. §§ 491, 496; Stephens' Dig. p. 205; Wigmore, §§ 1632, 1633, 1635. <sup>6</sup> 9 A. & E. Enc. p. 890; Elliott, §§ 405, 409; Greenl. § 563f; Stephens' Dig. pp. 391, 394; Wigmore, §§ 1215, 1218, 1221.

<sup>3</sup> Elliott, §§ 404, 407, 408; Stephens' Dig. p. 205; Wigmore, § 1634. <sup>7</sup> 9 A. & E. Enc. pp. 885-888; Elliott, §§ 405, 416-419; Greenl. § 497; Stephens' Dig. p. 212; Wigmore, §§ 1697-1699.

<sup>4</sup> Elliott, § 407.

<sup>5</sup> 9 A. & E. Enc. p. 880; Elliott, §§ 405, 406; Greenl. §§ 491, 496; Stephens'

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\* See Thayer's Cases, pp. 428-440; Wigmore's Cases, pp. 323-347. For current cases supplementing all citations in this section, see 5 Current Law, p. 1349, and subsequent volumes.



## 14. ANCIENT DOCUMENTS.\*

Any writing,<sup>1</sup> produced from such custody as, in the opinion of the court, is proper under the circumstances,<sup>2</sup> and proved to be<sup>3</sup> not less than thirty years old,<sup>4</sup> at the time it is introduced in evidence,<sup>5</sup> is admissible, without proof of its execution,<sup>6</sup> to the same extent as a modern document whose authenticity and execution have been duly proved.<sup>7</sup>

When such a document is offered in proof of ancient possession or title, proof of possession under it, or other corroborative evidence, is sometimes required.<sup>8</sup>

A further requirement that the ancient document when produced shall be free from alterations or other indicia of fraud has been recognized.<sup>9</sup>

<sup>1</sup> 2 A. & E. Enc. p. 322; Wigmore, § 2145.

<sup>2</sup> 2 A. & E. Enc. p. 326; Elliott, §§ 426, 429; Greenl. §§ 570, 575b; Stephens' Dig. pp. 412, 413; Wigmore, § 2139.

<sup>3</sup> 2 A. & E. Enc. p. 330; Elliott, § 430.

<sup>4</sup> 2 A. & E. Enc. pp. 322, 323; Elliott, §§ 421, 430; Greenl. §§ 570, 575b; Stephens' Dig. pp. 412, 413; Wigmore, § 2138.

<sup>5</sup> 2 A. & E. Enc. p. 324; Elliott, § 2140; Wigmore, § 2138.

<sup>6</sup> 2 A. & E. Enc. p. 324; Elliott, §§ 423-425, 431; Greenl. §§ 570, 575b; Stephens' Dig. pp. 412, 413; Wigmore, §§ 157, 2137, 2144.

<sup>7</sup> 2 A. & E. Enc. p. 331; Elliott, § 425.

<sup>8</sup> 2 A. & E. Enc. pp. 327-330; Elliott, §§ 423, 427; Greenl. § 575b; Wigmore, § 2141.

<sup>9</sup> 2 A. & E. Enc. p. 325; Elliott, § 432; Greenl. §§ 570, 575b; Wigmore,

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\* See Thayer's Cases, pp. 440-474. For current cases supplementing all citations in this section, see 5 Current Law, p. 1342, and subsequent volumes.



## 1. EXPERT AND NON-EXPERT.

The opinion of a witness is inadmissible,<sup>1</sup> except:

**Nonexpert opinion.** The opinion of an ordinary witness, who has personally observed the facts upon which the opinion is based, is admissible whenever the facts, which constitute the basis of the opinion are so numerous, complicated, evanescent, or consist of such minute data that they cannot be so described or reproduced before the jury, by words and gestures, that an intelligent, correct and adequate conception may result;<sup>2</sup> in some jurisdictions this opinion is only admissible in connection with the testimony of the witness setting forth, as far as possible, the facts upon which his opinion is based.<sup>3</sup>

**Expert opinion.** The opinion of a witness, having technical or peculiar skill, knowledge or experience, with regard to subjects presumably not within the knowledge of ordinary men, is admissible, when a question, involving such a subject, is presented for determination, and the tribunal (court or jury) is unlikely to prove capable of forming a correct conclusion thereon, without such assistance.<sup>4</sup> Expert opinions are generally given upon questions of science, art, trade and skill.<sup>5</sup>

Examples: (1) Kinds of experts, 12 A. & E. Enc. pp. 428-458; Elliott, §§ 1048-1095.

(2) Subjects of expert opinion, 12 A. & E. Enc. pp. 458-488; Elliott, §§ 1041, 1096-1114; Wigmore, pp. 2565, 2647.

(3) Subjects of nonexpert opinion, 12 A. & E. Enc. pp. 490-493; Elliott, §§ 675-686; Greenl. § 441j; Wigmore, pp. 2565, 2626, 2647.

<sup>1</sup> 11 A. & E. Enc. p. 548; 12 A. & E. Enc. p. 421; Elliott, §§ 671-674; Greenl. § 441b; Stephens' Dig. pp. 248, 264; Wigmore, §§ 658, 1917-1921.

<sup>2</sup> 12 A. & E. Enc. pp. 422, 488, 489; Elliott, §§ 672, 675-686; Greenl. § 441b; Stephens' Digest, pp. 258-267; Wigmore, pp. 267, 268.

<sup>3</sup> 12 A. & E. Enc. p. 488; Wigmore, § 1922 (criticism of this view).

<sup>4</sup> 12 A. & E. Enc. pp. 418-422; Elliott, §§ 1030, 1031, 1038-1040; Greenl. § 441b; Stephens' Dig. p. 267; Wigmore, §§ 1917, 1918, 1923.

<sup>5</sup> 12 A. & E. Enc. pp. 418, 423, 424; Elliott, §§ 1043, 1044; Stephens' Dig.

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\* See Thayer's Cases, pp. 672-719; Wigmore's Cases, pp. 410-438. For current cases supplementing all citations in this section, see 5 Current Law, p. 1353, and subsequent volumes.





## 2. QUALIFICATION OF EXPERT.

Before a witness is permitted to testify as an expert, his qualifications as such must be established by a preliminary examination;<sup>1</sup> the question whether he is so qualified is not determined by any definite standard, but rests in the reasonable discretion of the court.<sup>2</sup>

His qualifications while generally ascertained from his own testimony, may be established by other evidence, and, in the discretion of the court, he may be cross-examined to test his fitness.<sup>3</sup>

## 3. EXAMINATION OF EXPERT.

The opinion of an expert may be based:

**First.** Upon an hypothetical question, founded on facts admitted, established, or which might reasonably be found from the evidence, and assuming, for the purpose of the question, the existence of the facts it embodies; the hypothetical question should include substantially all the facts relating to the subject upon which the opinion is sought, and may be framed in accordance with any theory which the evidence reasonably tends to support.<sup>4</sup>

**Second.** Upon the evidence introduced which the witness has heard, or seen, providing it is not conflicting; the question should require the witness to assume the testimony to be true.<sup>5</sup>

**Third.** Upon personal knowledge of the facts, which should be disclosed by his testimony, whether such knowledge is obtained by experiment, or otherwise.<sup>6</sup>

The foregoing classifications are not mutually exclusive; an expert may testify upon data based in part upon personal knowledge, and in part upon an hypothetical question.<sup>7</sup>

<sup>1</sup> Elliott, §§ 1034, 1035, 1115; 8 Enc. P. & P. p. 745.

<sup>2</sup> 12 A. & E. Enc. pp. 427, 428; Elliott, §§ 1036, 1037, 1115; 8 Enc. P. & P. pp. 747-749; Greenl. § 430f; Stephens' Dig. p. 268; Wigmore, §§ 555, 556 (secondly), 560, 561.

<sup>3</sup> Elliott, §§ 1034, 1035, 1115, 1124, 1125; 8 Enc. P. & P. pp. 745, 746, 749; Wigmore, § 562 (2).

<sup>4</sup> Elliott, §§ 1116, 1117, 1119-1122; 8 Enc. P. & P. pp. 752-763; Greenl. §§ 441k, 441, 1; Wigmore, §§ 672-684.

<sup>5</sup> Elliott, § 1117; 8 Enc. P. & P. pp. 754, 764; Greenl. § 441, 1 (2).

<sup>6</sup> Elliott, § 1116; 8 Enc. P. & P. pp. 764, 765; Greenl. §§ 441k, 441, 1; Wigmore, § 675.

<sup>7</sup> Greenl. § 441, 1; Wigmore, § 673.



## II. EXHIBITS.

## A. DOCUMENTARY EVIDENCE.\*

Writings are divisible into two classes; public and private.

Public documents<sup>1</sup> may be divided into those which are judicial and those which are not judicial,<sup>2</sup> and both judicial and nonjudicial public documents may be again divided into domestic and foreign documents.

Private writings are either attested or unattested.

NOTE. In addition to official public documents, there are certain unofficial documents, of a public nature, which, upon identification as being what they purport to be, are generally considered admissible, e. g., almanacs, standard mortality tables, mathematical tables and tide tables—so standard histories have been admitted in evidence of remote, public matters, and newspapers have been admitted in proof of market prices.<sup>3</sup>

NOTE. In introducing an exhibit in evidence it is customary—

- (1) To request the court reporter to mark it, for identification, as an exhibit;
- (2) To have it identified by a witness, if the exhibit require such identification;
- (3) To formally offer it in evidence;
- (4) To submit it to the attorney of the adverse party, in order that he may either consent to its admission, or make objection thereto;
- (5) The objection, if any, being overruled by the court, the exhibit is received in evidence.

<sup>1</sup> 9 A. & E. Enc. pp. 880-885; 24 A. & E. Enc. pp. 885-890; Elliott, E. Enc. p. 155; Elliott, §§ 1271-1274; §§ 417-420, 1270; Greenl. §§ 162i, 162j, Greenl. § 470; Stephens' Dig. p. 393; 1621; Wigmore, §§ 1698, 1699, 1704. Thayer's Cas. p. 428 et seq.

<sup>2</sup> 9 A. & E. Enc. p. 880; Elliott, § 1270; Greenl. § 470.

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\* For current cases supplementing all citations in this section, see 5 Current Law, p. 1342, and subsequent volumes.



## 1. AUTHENTICATION OF PUBLIC DOCUMENTS.\*

(a) A domestic judicial record is sufficiently authenticated by the mere production of the original from the appropriate official custody;<sup>1</sup> by an exemplification, under the seal of state,<sup>1a</sup> or of the court having the custody of the record;<sup>2</sup> by a certificate, with the seal of the court affixed, by the lawful custodian,<sup>3</sup> whose authority to certify is presumed in the United States;<sup>4</sup> by an examined copy, proved to be a true copy, by a witness who personally compared the copy produced, with the original.<sup>5</sup>

(b) A domestic nonjudicial public document is sufficiently authenticated by the mere production of the original from the appropriate official custody;<sup>6</sup> by a copy certified by the lawful custodian<sup>7</sup> whose authority to certify is presumed in United States;<sup>8</sup> by an examined copy proved to be correct by a witness who personally compared it with the original,<sup>9</sup> or by a copy printed by authority.<sup>10</sup>

NOTE. The authentication of public documents is prescribed by acts of congress,<sup>11</sup> and also by statutes in each state.<sup>12</sup> Compliance with the statutes is customary in practice. These statutes, however, have generally been held to be merely cumulative.<sup>13</sup>

<sup>1</sup> 24 A. & E. Enc. p. 198; Elliott, §§ 724 A. & E. Enc. p. 205; Greenl. § 409, 1341; Greenl. §§ 501, 502; Stephens' Dig. p. 389; Wigmore, §§ 2131e, 1680, 2158.

<sup>1a</sup> In England, but not in United States. 12 A. & E. Enc. p. 57; Greenl. § 501.

<sup>2</sup> 12 A. & E. Enc. p. 57; 24 A. & E. Enc. p. 202; Elliott, §§ 1369, 1376, 1377; Greenl. §§ 502, 503; Stephens' Dig. 394; Wigmore, §§ 2161-2165.

<sup>3</sup> 24 A. & E. Enc. pp. 198, 202; Elliott, § 1369; Greenl. § 507; Stephens' Dig. p. 394; Wigmore, § 1681.

<sup>4</sup> Wigmore, §§ 1677, 1681.

<sup>5</sup> 24 A. & E. Enc. p. 198; Elliott, § 1486; Greenl. § 508; Stephens' Dig. p. 391; Wigmore, §§ 1279, 1677 (3), 1679 (2), 2158.

<sup>6</sup> Elliott, § 409; Greenl. §§ 482, 483, 485; Stephens' Dig. p. 389; Wigmore, §§ 2131e, 2158, 2159.

<sup>8</sup> 24 A. & E. Enc. p. 205; Greenl. § 485; Wigmore, §§ 1677, 1680, 1682.

<sup>9</sup> Elliott, § 1486; Greenl. §§ 485, 500; Stephens' Dig. p. 391; Wigmore, §§ 1279, 1677 (3), 1679 (2), 2158.

<sup>10</sup> 24 A. & E. Enc. p. 206; Greenl. §§ 479, 480, 482, 489, 500; Wigmore, § 1684.

<sup>11</sup> 24 A. & E. Enc. pp. 203, 205; Elliott, §§ 1346, 1347; Greenl. §§ 485, 504; Wigmore, §§ 1680, 1681.

<sup>12</sup> 24 A. & E. Enc. pp. 203, 205; Elliott, §§ 1348, 1349; Greenl. § 485, note; Wigmore, §§ 1680, 1682 (Abstract of Statutes in note).

<sup>13</sup> 24 A. & E. Enc. p. 198; Elliott,

\* See Wigmore's Cases, pp. 215-233. For current cases supplementing all citations in this section, see 5 Current Law, p. 1349, and subsequent volumes.



## 1. AUTHENTICATION OF PUBLIC DOCUMENTS (Cont'd).

(c) Foreign judgments may be authenticated by an exemplification under the great seal of the foreign state;<sup>1</sup> by an examined copy, proved to be true by a witness who compared it with the original;<sup>1</sup> or by a certificate<sup>1</sup> under the hand, and if there be one, under the seal of an officer authorized by law to certify, which certificate must be authenticated by the great seal of the foreign state.<sup>2</sup>

(d) Foreign laws may be authenticated by an exemplification under the great seal of the foreign state;<sup>3</sup> by an examined copy proved to be true by a witness who compared it with the original;<sup>4</sup> by a certificate of an officer legally authorized to certify, which certificate should be duly authenticated<sup>5</sup> by the great seal of the foreign state;<sup>6</sup> by a printed copy purporting<sup>7</sup> to be published by authority;<sup>8</sup> or by competent witnesses.<sup>9</sup>

<sup>1</sup> 13 A. & E. Enc. pp. 1038, 1039; 5 Current Law, p. 1489; Elliott, §§ 1366, 1376, 1486; Greenl. § 514; Wigmore, § 1681 (2), 2163, 2164.

<sup>2</sup> Elliott, §§ 1366, 1376, 1377; Greenl. § 479; Wigmore, §§ 2163-2165.

<sup>3</sup> 13 A. & E. Enc. p. 1064; Greenl. § 488.

<sup>4</sup> 13 A. & E. Enc. p. 1064; Elliott, § 1486; Greenl. § 488.

<sup>5</sup> Greenl. § 488.

<sup>6</sup> Greenl. § 479; Wigmore, §§ 2163, 2165.

<sup>7</sup> 13 A. & E. Enc. p. 1067; Greenl. § 488; Wigmore, § 1684.

<sup>8</sup> 13 A. & E. Enc. pp. 1065-1069; Elliott, § 1282; Greenl. § 488; Wigmore, § 1684c.

<sup>9</sup> 13 A. & E. Enc. pp. 1070, 1071; Elliott, §§ 1279, 1282; Greenl. §§ 1621, 488; Wigmore, §§ 564, 690, 1697.





## 2. PROOF OF EXECUTION OF ATTESTED PRIVATE WRITINGS.\*

The rule is<sup>1</sup> that at least one of the subscribing witnesses must be produced for the purpose of proving the execution of an attested document, if such witness is available.

The testimony of one of the subscribing witnesses is sufficient, unless by statute more than one is required.<sup>2</sup>

A subscribing witness is one who writes his name on a document at the request, or with the assent, of the maker, as a witness to its execution, and who was either present when the maker wrote his name, or to whom the maker immediately thereafter acknowledged his signature.<sup>3</sup>

The requirement that the subscribing witness must be “produced” is satisfied when his testimony is rendered available.<sup>4</sup> The execution of the attested instrument is not necessarily established by his testimony.<sup>5</sup>

The foregoing rule is applicable only to proof of the execution of the attested document, and does not apply to proof of its delivery or contents.<sup>6</sup>

An attested document, at common law, was an instrument upon which the signature of a subscribing witness appeared, even though the attestation were not required by law; but in England, and generally throughout the United States, by statute, proof of execution by the subscribing witnesses is only necessary when the instrument is required, by law, to be attested.<sup>7</sup>

<sup>1</sup> 11 A. & E. Enc. p. 589; Elliott, §§ 2686, 2701; Greenl. § 569; Stephens' Dig. p. 358; Wigmore, p. 1564.

<sup>2</sup> 11 A. & E. Enc. p. 602; Greenl. § 569d; Stephens' Dig. p. 358; Wigmore, § 1304.

<sup>3</sup> 11 A. & E. Enc. p. 590, note; Greenl. § 569c; Wigmore, § 1292.

<sup>4</sup> Wigmore, § 1302.

<sup>5</sup> Authorities cited *infra*, p. 36.

<sup>6</sup> Wigmore, § 1293.

<sup>7</sup> 11 A. & E. Enc. p. 593; Greenl. § 569a; Stephens' Dig. p. 365 (contra); Wigmore, § 1290.

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\* See Thayer's Cases, pp. 735-777; Wigmore's Cases, pp. 260-268. Consult local statutes. For current cases supplementing all citations in this section, see 5 Current Law, p. 1342, and subsequent volumes.



## 2. PROOF OF EXECUTION OF ATTESTED PRIVATE WRITINGS (Cont'd).

**Application of the rule.** The rule requiring the production of the subscribing witnesses to prove the execution of an attested document does not apply when:

- (a) The author judicially<sup>1</sup> (e. g., by pleadings) admits the execution.<sup>2</sup>
- (b) The adverse party upon notice produces the document and claims under it.<sup>3</sup>
- (c) The adverse party refuses, on notice, to produce the document.<sup>4</sup>
- (d) When the document is only incidentally or collaterally in issue.<sup>5</sup>
- (e) When the instrument is an ancient document.<sup>6</sup>
- (f) When the opponent is estopped to deny the execution.<sup>7</sup>
- (g) In some jurisdictions, by statute, when the instrument has been acknowledged and recorded.<sup>8</sup>

The rule requiring the production of the subscribing witness, to prove the execution of an attested document, has been held to apply, even though the document is lost or destroyed, if the witness is known;<sup>9</sup> though the subscribing witness is blind;<sup>10</sup> though the extra judicial admission of the author is proven.<sup>11</sup>

<sup>1</sup> 1 A. & E. Enc. p. 719.

<sup>7</sup> Stephens' Dig. p. 362; Wigmore, §§

<sup>2</sup> 11 A. & E. Enc. p. 587; Greenl. § 572; Wigmore, §§ 1257, 1295, 1296, 2132 (2).

1294, 2132.

<sup>8</sup> 11 A. & E. Enc. p. 588; Greenl. §§ 485, 573; Wigmore, § 1318.

<sup>3</sup> 11 A. & E. Enc. p. 586; Greenl. § 571; Stephens' Dig. p. 362; Wigmore, §§ 1297, 1298.

<sup>9</sup> 11 A. & E. Enc. p. 591; Greenl. § 572; Stephens' Dig. p. 358; Wigmore, § 1314.

<sup>4</sup> 11 A. & E. Enc. p. 586, note 1; Stephens' Dig. p. 362, 368; Wigmore, § 1298.

<sup>10</sup> 11 A. & E. Enc. p. 597; Greenl. § 572; Stephens' Dig. p. 358; Wigmore, § 1316.

<sup>5</sup> 11 A. & E. Enc. p. 599; Greenl. § 573b; Wigmore, § 1291.

<sup>11</sup> 11 A. & E. Enc. p. 592; Greenl. §§ 563k, 569b; Stephens' Dig. p. 359; Wigmore, §§ 1300, 1301, 2132 (3).

<sup>6</sup> 11 A. & E. Enc. p. 587; Greenl. § 570; Stephens' Dig. p. 412; Wigmore, §§ 1311, 2137-2146.



## 2. PROOF OF EXECUTION OF ATTESTED PRIVATE WRITINGS (Cont'd).\*

**Unavailability of the subscribing witnesses.** If each<sup>1</sup> of the subscribing witnesses is either dead,<sup>2</sup> out of the jurisdiction,<sup>3</sup> unknown,<sup>4</sup> or notwithstanding a diligent search, cannot be found,<sup>5</sup> or refuses to testify,<sup>6</sup> or denies, or does not recollect having seen the instrument executed,<sup>7</sup> or is too ill or infirm to appear at the trial (his deposition is then usually required),<sup>8</sup> or if the attesting witness, since execution, has become infamous,<sup>9</sup> or disqualified by interest,<sup>10</sup> or has become insane,<sup>11</sup> or when from other physical or legal causes, it is not in the power of the party to produce the witness at the trial,<sup>12</sup> the execution of the instrument may, in the absence of statute, be proved by authenticating the signature<sup>13</sup> of one<sup>14</sup> of the attesting witnesses; by proving the signature of the one who executed the instrument;<sup>15</sup> or by other evidence.<sup>16</sup>

<sup>1</sup> 11 A. & E. Enc. p. 591; Greenl. § 572a; Stephens' Dig. p. 358; Wigmore, § 1309.

<sup>2</sup> 11 A. & E. Enc. p. 594; Greenl. § 572; Stephens' Dig. p. 358; Wigmore, § 1311.

<sup>3</sup> 11 A. & E. Enc. p. 595; Greenl. § 572; Stephens' Dig. p. 358; Wigmore, § 1312.

<sup>4</sup> 11 A. & E. Enc. p. 591, note 2; Greenl. § 572; Wigmore, § 1314.

<sup>5</sup> 11 A. & E. Enc. pp. 595, 596; Greenl. §§ 572-572a; Stephens' Dig. p. 358; Wigmore, § 1314.

<sup>6</sup> Wigmore, § 1317.

<sup>7</sup> 11 A. & E. Enc. p. 598; Greenl. § 572; Stephens' Dig. p. 364; Wigmore, §§ 1302, 1315.

<sup>8</sup> 11 A. & E. Enc. p. 595 (handwriting); Wigmore, § 1315.

<sup>9</sup> 11 A. & E. Enc. p. 597; Greenl. § 572; Wigmore, § 1315.

<sup>10</sup> 11 A. & E. Enc. p. 597; Greenl. § 572; Wigmore, § 1316.

<sup>11</sup> 11 A. & E. Enc. p. 597; Greenl. § 572; Stephens' Dig. p. 358; Wigmore, § 1316.

<sup>12</sup> Wigmore, §§ 1308, 1310-1319.

<sup>13</sup> 11 A. & E. Enc. pp. 600, 602; Greenl. § 575; Stephens' Dig. p. 358; Wigmore, § 1306.

<sup>14</sup> 11 A. & E. Enc. p. 602; Greenl. § 575; Stephens' Dig. 358; Wigmore, § 1306.

<sup>15</sup> 11 A. & E. Enc. pp. 600, 601; Greenl. § 575; Wigmore, § 1320.

<sup>16</sup> 11 A. & E. Enc. pp. 592, 601; Greenl. § 575; Wigmore, §§ 1320-1, 2131.

\* Wigmore's Cas. p. 300.



## II. EXHIBITS.—A. DOCUMENTARY EVIDENCE.

## 3. PROOF OF EXECUTION OF UNATTESTED INSTRUMENTS.\*

The execution of an instrument in writing, signed, but unattested, may be established:

**First.** By the admission of the author.<sup>1</sup>

**Second.** By proof of his signature by (a) one who saw the signature in question written, (b) one familiar with the signature, (c) a comparison of the signature in question with one authenticated.<sup>2</sup>

**Third.** Or by other identification of the author.<sup>3</sup>

If the written instrument is neither signed nor attested, the authorship of it may be proved as in "first" and "third" supra.<sup>4</sup>

If the instrument in writing is an "ancient document" its execution need not be proved.<sup>5</sup>

<sup>1</sup> 11 A. & E. Enc. p. 589; Wigmore, Greenl. § 575c; Wigmore, §§ 2131, 2134, §§ 666, 2131 (2), 2132.

<sup>4</sup> Citations under (1) and (3) supra.

<sup>2</sup> 11 A. & E. Enc. pp. 588, 589; 15 A. Wigmore, §§ 666, 2131, 2134 (2), 2148-2154, 2156.

& E. Enc. pp. 252, 253 (proof of handwriting); Greenl. §§ 576-581a; Thayer's Cas. p. 735, note 1; Wigmore, §§ 666, 2131, 2134. <sup>5</sup> Elliott, § 1317; Greenl. § 575b; Stephens' Dig. p. 412; Wigmore, §§ 2137-2146.

<sup>3</sup> 11 A. & E. Enc. p. 589, note 1;

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\* For current cases supplementing all citations in this section, see 5 Current Law, p. 1342, and subsequent volumes.





## 4. PROOF OF CONTENTS OF WRITINGS.\*

The rule is<sup>1</sup> that to prove the contents of a writing, the writing itself must be produced before the tribunal, unless, for a legally sufficient reason, its production is excused, whereupon secondary evidence of its contents becomes admissible.

**Limitation of rule to contents.** The foregoing rule requiring the production of a writing is limited to proof of its "contents," and does not apply to proof of other facts, incidentally involving the writing;<sup>2</sup> so the fact of delivery of a document;<sup>3</sup> of tenancy;<sup>4</sup> of transfer of personalty;<sup>5</sup> of agency;<sup>6</sup> of partnership;<sup>7</sup> of conversion<sup>8</sup> or loss of a document;<sup>9</sup> of payment of a written claim;<sup>10</sup> may be proved without production of the writing; and so it has been held that production is not necessary when a person's belief or knowledge about a document, and not its terms, is material,<sup>11</sup> and in some cases that the fact of transfer of realty may be proved without the production of the deed,<sup>12</sup> and that the existence, execution and identity of a document may in some cases be proved without production.<sup>13</sup> Other illustrations.<sup>14</sup>

**Extent of application of rule.** The foregoing rule is applicable to all kinds of "writings,"<sup>15</sup> but it is impossible to precisely define the inscribed chattels which fall within the rule;<sup>16</sup> the necessity of production of the latter should rest in the discretion of the court.<sup>17</sup>

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| <sup>1</sup> 25 A. & E. Enc. p. 162; Elliott, §§ 205, 208, 210, 211; Greenl. § 563a; Stephens' Dig. pp. 354, 368; Wigmore, pp. 1383, 1384. | <sup>9</sup> Greenl. § 563o; Wigmore, § 1249;                  |
| <sup>2</sup> Greenl. § 563o; Wigmore, § 1242.  | <sup>10</sup> Elliott, § 216; Greenl. § 563o; Wigmore, § 1245. |
| <sup>3</sup> Greenl. § 563o; Wigmore, § 1248.  | <sup>11</sup> Wigmore, § 1243 (2).                             |
| <sup>4</sup> Elliott, § 216; Greenl. § 563k; Wigmore, § 1246.  | <sup>12</sup> Elliott, § 216; Greenl. § 563o; Wigmore, § 1247. |
| <sup>5</sup> Elliott, § 216; Greenl. § 563o; Wigmore, § 1247.  | <sup>13</sup> Elliott, § 216; Wigmore, §§ 1244, 1248.          |
| <sup>6</sup> Wigmore, § 1249.  | <sup>14</sup> Elliott, §§ 216, 1442.                           |
| <sup>7</sup> Wigmore, § 1249.  | <sup>15</sup> Elliott, § 205; Greenl. § 563p; Wigmore, § 1183. |
| <sup>8</sup> Greenl. § 563o.   | <sup>16</sup> Greenl. § 563n; Wigmore, § 1182.                 |
|  | <sup>17</sup> Greenl. § 563n; Wigmore, § 1182.                 |

\* See Thayer's Cases, pp. 778-820; Wigmore's Cases, pp. 234-259. For current cases supplementing all citations in this section, see 5 Current Law, p. 1315, and subsequent volumes.



## 4. PROOF OF CONTENTS OF WRITINGS (Cont'd).

**What writing must be produced.** "The" writing, of which production is required, is the original.<sup>1</sup>

If there is more than one document, the original will usually be determined by the issues in the case.<sup>2</sup>

If the several documents are counterparts, or impressions from the unchanged typesetting of a printing press, each is regarded as an original, unless the issues designate one in particular.<sup>3</sup>

**"Production"** means the submission of the writing to the tribunal for inspection.<sup>4</sup>

**Effect of excuse for non-production.** The fact that a legally sufficient reason for the nonproduction of a writing exists, which excuses the production of the original and renders secondary evidence of its contents admissible, does not dispense with the necessity of proof of its existence,<sup>5</sup> or with authentication.<sup>6</sup>

<sup>1</sup> Elliott, § 1450; Greenl. § 563p;      <sup>4</sup> Wigmore, § 1185.  
Wigmore, § 1231, 1233-1241.      <sup>5</sup> 25 A. & E. Enc. p. 169; Elliott, §  
<sup>2</sup> Greenl. § 563p; Wigmore, §§ 1231, 1458; Greenl. § 563 (b).  
1235-1237.      <sup>6</sup> 25 A. & E. Enc. p. 169; Elliott, §  
<sup>3</sup> Elliott, § 208; Greenl. § 563p; Wig- 1458; Wigmore, § 1188.  
more, §§ 1232, 1234.



## 5. EXCUSES FOR NONPRODUCTION.

Production of the writing is excused, and its nonproduction is sufficiently accounted for to render secondary evidence admissible, under the following circumstances:

(a) **Lost or destroyed document.** When the writing is lost or destroyed its production is excused,<sup>1</sup> providing a diligent search for it has been made.<sup>2</sup>

What constitutes a diligent search depends upon the circumstances of the particular case and the nature of the document. It may be stated generally, that a reasonable and bona fide search is required.<sup>3</sup>

If the writing is executed in duplicate, or multiplicate, the loss of each original must be proved in order to render secondary evidence of its contents admissible.<sup>4</sup>

Secondary evidence of the contents of the writing is admissible even though the writing was voluntarily destroyed by the proponent, if he rebut the inference of fraudulent design.<sup>5</sup>

The sufficiency of the proof of loss, destruction and diligent search is determined by the court.<sup>6</sup>

<sup>1</sup> 25 A. & E. Enc. p. 163; Elliott, §§ 210, 1449-1457, 1476-1490; Greenl. § 1450; Greenl. § 563b; Wigmore, §§ 563b; Stephens' Dig. p. 369; Wigmore, 1233, 1234.  
<sup>2</sup> 25 A. & E. Enc. p. 163; Elliott, §§ 1193, 1194.

<sup>3</sup> 25 A. & E. Enc. p. 165; Elliott, §§ 211, 1459-1473; Greenl. § 563b; Stephens' Dig. p. 369; Wigmore, § 1194.  
<sup>4</sup> 25 A. & E. Enc. p. 167; Elliott, § 1474, 1475; Greenl. § 563b; Wigmore, § 1198.

<sup>5</sup> 25 A. & E. Enc. pp. 166, 167; Elliott, §§ 1456; Greenl. § 563b; Stephens' Dig. §§ 1451, 1459; Greenl. § 563b; p. 370; Wigmore, §§ 1192 (3), 1194. Wigmore, §§ 1194-1196.  
<sup>6</sup> 25 A. & E. Enc. p. 167; Elliott, § 1456; Greenl. § 563b; Stephens' Dig. §§ 1192 (3), 1194.



## II. EXHIBITS.—A. DOCUMENTARY EVIDENCE.

## 5. EXCUSES FOR NONPRODUCTION (Con't).

(b) **Documents in control of adverse party.** When the original is within the control of the adverse party, who, notwithstanding due notice to produce it, has not done so,<sup>1</sup> production is excused.

Actual custody of the original by the adverse party need not be shown; it is sufficient if it is within his power.<sup>2</sup>

The notice to produce must be in writing<sup>2a</sup> and must describe the desired writing with reasonable certainty, and may be served upon either the adverse party or his attorney; the interval between the date of service of the notice, and the date upon which production is required, must be such as to enable the adverse party, under the known circumstances of the case, to comply with its requirements.<sup>3</sup>

A party refusing to produce after due notice cannot later rebut the secondary evidence, which thus becomes admissible, by resorting to the original.<sup>4</sup>

If the writing is in court, notice to produce may then be given; an instant demand is sufficient.<sup>5</sup>

No notice to produce is necessary in order to render secondary evidence admissible:

- (1) When the writing to be produced and that to be proved are duplicate originals.<sup>6</sup>
- (2) When the instrument to be proved is itself a notice.<sup>6</sup>
- (3) When from the nature of the action the defendant has notice that he is charged with the possession of the writing.<sup>6</sup>
- (4) When the adverse party has obtained possession of the original from a party duly subpoenaed to produce it.<sup>6</sup>
- (5) When notice is waived.<sup>7</sup>

<sup>1</sup> 25 A. & E. Enc. p. 169; Elliott, §§ 1435, 1437; Greenl. § 563d; Stephens' Dig. p. 627; Wigmore, § 1210.  
<sup>2</sup> Elliott, §§ 1418, 1423; Greenl. § 563c (contra); Stephens' Dig. p. 383; Wigmore, § 1204.

<sup>2a</sup> Elliott, § 1430; Greenl. § 563c; Wigmore, § 1200.

<sup>3a</sup> Elliott, § 1425; Wigmore, § 1208.

<sup>3</sup> Elliott, §§ 1417-1419, 1424, 1425, 1432-1434; Greenl. § 563d; Stephens' Dig. p. 382; Wigmore, §§ 1202, 1203, 1208.

<sup>4</sup> 25 A. & E. Enc. p. 171; Elliott, §§

<sup>5</sup> 25 A. & E. Enc. pp. 170, 171 (except 4); Greenl. § 563c; Elliott, §§ 1438-1444; Stephens' Dig. p. 383; Wigmore, §§ 1205-1207, 1232-1234. (Wigmore, § 1206, says (2) supra is not generally recognized except where the notice is a notice to produce.)

<sup>7</sup> Wigmore, § 1207 (6).





## 5. EXCUSES FOR NONPRODUCTION (Con't).

(c) **Public documents.** When the original is a public document, production is excused. For the contents of any public document whatever may be proved by a properly authenticated copy.<sup>1</sup>

(d) **Recorded documents.** When the original is a private writing which has been duly recorded, production is excused, although in some jurisdictions the foregoing does not apply where the grantee is either the proponent or the adverse party; and in other jurisdictions the recorded original must be accounted for as if unrecorded.<sup>2</sup>

(e) **Nonportable documents.** When the writing appears upon a nonportable object, production is excused.<sup>3</sup>

(f) **Voluminous documents.** When the originals consist of voluminous documents, and the fact to be proved is a summary, or the result of an examination of such documents, the examination of which could not be conveniently made in court, production is excused.<sup>4</sup>

(g) **Original in possession of third person.** When the original of the writing to be proved is in the possession of a third person, out of the jurisdiction;<sup>5</sup> although some courts will not, under such circumstances, permit secondary evidence to be introduced, unless it is first shown that an effort has been made to procure the original.<sup>6</sup>

If the original is in the possession of a third person within the jurisdiction of the court, resort to a subpoena duces tecum is essential.<sup>7</sup>

(h) **Collateral document.** When a writing is merely "collateral" to the issue, production may be excused.<sup>8</sup>

(i) **Contents of writing admitted.** When the judicial admission of the contents of the writing by the adverse party is proven, its production is excused.<sup>9</sup> In some jurisdictions any proven admission is sufficient.<sup>10</sup>

(j) **Documents referred to upon voir dire.** When, during the examination of a witness upon voir dire, it appeared that the disqualifying fact was contained in, or was removed by, a writing, production was excused.<sup>11</sup>

<sup>1</sup> 24 A. & E. Enc. p. 200; Elliott, § 210, 409, 1271-1316 (but compare § 212); Greenl. § 563f; Stephens' Dig. p. 391; Wigmore, §§ 1215-1222.

<sup>2</sup> 25 A. & E. Enc. 174, 175 (Statutes); Elliott, § 210; Wigmore, § 1224.

<sup>3</sup> 25 A. & E. Enc. p. 174; Elliott, § 210; Greenl. § 563i; Stephens' Dig. p. 369; Wigmore, § 1214.

<sup>4</sup> 25 A. & E. Enc. p. 173; Elliott, § 210; Greenl. § 563h; Stephens' Dig. p. 369; Wigmore, § 1230.

<sup>5</sup> 25 A. & E. Enc. p. 171; Elliott, §§ 210, 1449; Greenl. § 563e; Wigmore, § 1213.

<sup>6</sup> 25 A. & E. Enc. pp. 172, 173; Greenl. § 563e; Wigmore, § 1213.

<sup>7</sup> Elliott, § 1443; Greenl. § 563e; Stephens' Dig. p. 369; Wigmore, § 1212.

<sup>8</sup> 25 A. & E. Enc. p. 173; Elliott, § 216, 1264; Greenl. § 563 m, o; Wigmore, § 1252-1254.

<sup>9</sup> Greenl. § 563 k, l; Wigmore, §§ 1255-1257.

<sup>10</sup> Stephens' Dig. p. 351; Wigmore, §§ 1255-1256.

<sup>11</sup> Elliott, § 210; Greenl. § 563j; Wigmore, § 1258.



## 6. SECONDARY EVIDENCE OF UNPRODUCED WRITINGS.

“Secondary evidence means:

**First.** Examined copies, exemplifications, office copies, and certified copies:

**Second.** Other copies made from the original and proved to be correct:

**Third.** Counterparts of documents as against the parties who did not execute them:

**Fourth.** Oral accounts of the contents of a document given by some person who has himself seen it.”<sup>1</sup>

**Degrees of secondary evidence.** The courts are divided upon the question whether there are degrees of secondary evidence;<sup>2</sup> in some jurisdictions the rule that there are no such degrees obtains;<sup>3</sup> while in others, degrees of secondary evidence are recognized.<sup>4</sup>

<sup>1</sup> Stephens' Dig. p. 366. Compare 25 A. & E. Enc. p. 162; Elliott, §§ 1260-1269; Greenl. § 563 q, r; Wigmore, § 1265.      <sup>3</sup> 25 A. & E. Enc. p. 162; Elliott, §§ 207, 209, 1265, 1266; Wigmore, § 1268.

<sup>2</sup> 25 A. & E. Enc. p. 162; Elliott, §§ 209, 1265, 1266; Greenl. § 563q; Wigmore, § 1268.      <sup>4</sup> 25 A. & E. Enc. p. 162; Elliott, §§ 209, 1265, 1266; Greenl. § 563q; Wigmore, §§ 1265-1282.



## 7. THE PAROL EVIDENCE RULE.\*

A rule which is one of substantive law<sup>1</sup> but which is generally expressed in terms of evidence, has been comprehensively stated as follows:

“When any judgment of any court or any other judicial or official proceeding, or any contract or grant, or any other disposition of property, has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceeding, or of the terms of such contract, grant, or other disposition of property except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible. Nor may the contents of any such document be contradicted, altered, added to, or varied by oral evidence.”<sup>2</sup>

The effect of the rule is to exclude any evidence of expressions of the parties other than that which is furnished by the writing itself.<sup>3</sup>

The evidence excluded by the rule is not merely oral, but comprehends other writings.<sup>4</sup>

<sup>1</sup> 21 A. & E. Enc. p. 1079; Greenl. § 305a, (1); Wigmore, § 2400 (1).      <sup>3</sup> Greenl. §§ 277, 305b (p. 437); Wigmore, § 2425.

<sup>2</sup> 21 A. & E. Enc. p. 1078; Elliott, § 568; Stephens' Dig. p. 420.      <sup>4</sup> Greenl. § 305a (2); Wigmore, § 2400 (2).

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\* See Thayer's Cases, pp. 820-1065; Wigmore's Cases, pp. 526-576. For current cases supplementing all citations in this section, see 5 Current Law, p. 1319, and subsequent volumes.



## 7. THE PAROL EVIDENCE RULE (Cont'd).

**Evidence not excluded.** The rule does not exclude evidence—

- (a) Showing that the instrument is void or voidable.<sup>1</sup>
- (b) Showing the existence of a condition precedent.<sup>2</sup>
- (c) Of a subsequent agreement altering, discharging or superseding the original.<sup>3</sup>
- (d) Of incidents annexed by usage or custom, providing they are not inconsistent with the terms of the writing.<sup>4</sup>
- (e) Of collateral agreements not intended to be embodied in, or superseded by the written instrument, and not inconsistent with it.<sup>5</sup>
- (f) Showing the real nature of the written instrument, e. g., the existence of a parol trust.<sup>6</sup>
- (g) Contradicting receipts, or recitals in deeds, unless the receipt or recital is contractual, i. e., is more than a unilateral admission.<sup>7</sup>
- (h) When the writing was not intended to have effect as a final written memorial, e. g., a mere memorandum.<sup>8</sup>
- (i) Which merely interprets or explains the writing.<sup>9</sup>
- (j) In proof of, or to explain an alteration.<sup>10</sup>
- (k) The parol evidence rule only applies between the parties, or their privies.<sup>11</sup>

<sup>1</sup> 21 A. & E. Enc. pp. 1098-1102; Elliott, §§ 573-575, 591-595; Greenl. §§ 284, 296a, 305d; Stephens' Dig. p. 420, 421; Wigmore, §§ 2404-2423.

<sup>2</sup> 21 A. & E. Enc. p. 1097; Elliott, § 575; Stephens' Dig. p. 421; Wigmore, §§ 2408, 2410.

<sup>3</sup> 21 A. & E. Enc. p. 1102; Elliott, §§ 581, 596; Greenl. §§ 302-304; Stephens' Dig. p. 421; Wigmore, § 2441.

<sup>4</sup> Elliott, § 607; Greenl. § 294; Stephens' Dig. pp. 420, 421; Wigmore, § 2440.

<sup>5</sup> 21 A. & E. Enc. pp. 1089-1096; Elliott, §§ 576, 578-580, 585; Greenl. §§ 282, 283, 284a, 305b (2); Stephens' Dig. p. 420; Wigmore, §§ 2430-2438.

<sup>6</sup> 21 A. & E. Enc. p. 1102; Elliott, §§ 584, 586-588; Greenl. § 296a; Wigmore, §§ 2437, 2438.

<sup>7</sup> 21 A. & E. Enc. p. 1088, 1102; Elliott, §§ 582, 583, 589; Greenl. §§ 285, 305; Wigmore, §§ 2432, 2433.

<sup>8</sup> 21 A. & E. Enc. p. 1086; Elliott, § 576; Greenl. §§ 282, 305b (2), 305e; Stephens' Dig. p. 422; Wigmore, § 2429.

<sup>9</sup> 21 A. & E. Enc. pp. 1104-1123; Elliott, §§ 597-606, 608; Greenl. §§ 277-278, 280, 286-293, 295-301, 305i-n; Stephens' Dig. pp. 441-443; Wigmore, §§ 2458-2478.

<sup>10</sup> Elliott, § 590.

<sup>11</sup> 21 A. & E. Enc. pp. 1103, 1104; Elliott, § 572; Greenl. §§ 279, 305h; Stephens' Dig. pp. 454, 455; Wigmore, § 2446.



b. - a writing, not under seal or which does not require a seal to make it valid, when complete on its face, may by parole be shown to have been delivered conditionally.

Reynolds v. Robinson - 110 W. 654

Blewett v. Boorman - 142 W. 357

This does not apply to cases relating to real estate.

## 8. RULES AS TO ALTERATIONS OF WRITINGS.\*

The rules relating to alterations of writings<sup>1</sup> are not properly parts of the law of evidence.<sup>2</sup>

While the authorities are not harmonious,<sup>3</sup> the modern tendency of the courts appears to be to hold that, when an alteration appears to have been made upon a written instrument, the party relying upon the writing must satisfactorily account for the alteration;<sup>4</sup> this burden is determined by the pleadings.<sup>5</sup>

<sup>1</sup> 2 A. & E. Enc. pp. 181-284; Elliott, §§ 1491-1517; Greenl. §§ 564-568a; 1504, 1505; Greenl. § 564; Wigmore, § Stephens' Dig. p. 416 (Presumptions). 2525.

<sup>2</sup> Thayer's Cas. p. 777.

<sup>5</sup> Greenl. § 564; Wigmore, § 2525.

<sup>3</sup> 2 A. & E. Enc. pp. 274-284; Elliott, § 1504; Greenl. § 564; Thayer's Cas. pp. 777, 778.

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\* For current cases supplementing all citations in this section, see 5 Current Law, p. 110, and subsequent volumes.



## II. EXHIBITS.

## B. REAL EVIDENCE.\*

Real evidence (sometimes called "immediate,"<sup>1</sup> "autoptic"<sup>2</sup> or "demonstrative"<sup>3</sup> evidence) is that presented directly to the senses of the tribunal (court or jury)<sup>4</sup> without an intervening medium of proof.<sup>5</sup> It is based upon the principle of *res ipsa loquitur*.

As a general rule it may be stated that when evidence of any observable quality of a person or thing is relevant and material, real evidence, that is, the object itself, may be submitted to the senses of the tribunal.<sup>6</sup>

The exception to this rule, most generally recognized, is where the exhibition would involve immodesty or indecency;<sup>7</sup> a few other exceptions have been recognized by some of our courts.<sup>8</sup>

Examples of real evidence.<sup>9</sup>

- <sup>1</sup> Wambaugh's Synopsis of the Law of Evidence, p. 3.      13c; Wigmore, §§ 1151, 1154.  
<sup>2</sup> Wigmore, § 24.      <sup>7</sup> 16 A. & E. Enc. p. 817; Greenl. § 13g; Wigmore, § 1159.  
<sup>3</sup> 20 Century Dig. p. 1008.      <sup>8</sup> 16 A. & E. Enc. p. 817; Greenl. §§ 13c-13h; Wigmore, §§ 1154-1160.  
<sup>4</sup> 11 A. & E. Enc. p. 536; Elliott, § 1219; Greenl. § 13b; Thayer's Cas. p. 720; Wambaugh's Synopsis of Law of Evidence, p. 3; Wigmore, §§ 24, 1150.      <sup>9</sup> 11 A. & E. Enc. pp. 537, 538; 20 Century Dig. col. 1008; Elliott, §§ 1220, 1222, 1223, 1231-1241; 1 Greenl. §§ 13b, 13c; Stephens' Dig. pp. 6, 11; Thayer's Cas. pp. 720-734; Wigmore, §§ 24, 1150-1168.  
<sup>5</sup> 11 A. & E. Enc. p. 536; Wambaugh's Synopsis of Law of Evidence p. 3.  
<sup>6</sup> Elliott, § 1220; Greenl. §§ 13b;

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\* See Thayer's Cases, pp. 720-734; Wigmore's Cases, pp. 159-161. For current cases supplementing all citations in this section, see 5 Current Law, p. 1365, and subsequent volumes.



## C. REPRESENTATIVE REAL EVIDENCE.

**1. Representations.** Photographs, maps, charts, plans, models, diagrams, drawings, sketches, etc., are admissible (subject usually to the rules governing secondary evidence)<sup>1</sup> where evidence of the physical characteristics of the person, place or thing they represent is relevant and material, if they are duly authenticated, by any one having knowledge, as being correct representations.<sup>2</sup>

**2. Experiments.** The court, in the exercise of its reasonable discretion,<sup>3</sup> may permit, or refuse to permit, an experiment to be performed before the jury.<sup>4</sup>

The conditions governing the experiment must be similar to those governing the occurrence which the experiment represents,<sup>5</sup> unless the object of the experiment is to show similar results from a variety of conditions.<sup>6</sup>

It is error for the members of the jury, without the consent of the court, to perform experiments, which influence their verdict.<sup>7</sup>

The court in its discretion may also permit evidence of experiments made out of court,<sup>8</sup> even though *ex parte*.<sup>9</sup>

<sup>1</sup> 22 A. & E. Enc. pp. 772, 773 (photographs); Elliott, § 1228 (photographs); Stephens' Dig. p. 344; Wigmore, § 796.

<sup>2</sup> 11 A. & E. Enc. p. 539 (photographs, models, diagrams, maps); 22 A. & E. Enc. pp. 773-776 (photographs); Elliott, §§ 1224-1228; Greenl. §§ 439g, 439h; Stephens' Dig. pp. 213, 214, 216-219, 344, 346; Thayer's Cas. p. 726, note 1 (discussion re photographs); Wigmore, §§ 790-797.

<sup>3</sup> 12 A. & E. Enc. pp. 399, 400; Elliott, §§ 1245, 1246, 1250; Greenl. §§ 13c, 14v; Wigmore, § 1154 (7).

<sup>4</sup> 12 A. & E. Enc. pp. 398-413; Elliott, §§ 1245-1247; Wigmore, §§ 445, 1160.

<sup>5</sup> 11 A. & E. Enc. p. 536; 12 A. & E. Enc. pp. 403-409; Elliott, §§ 1249, 1252; Greenl. § 14v; Wigmore, § 1154 (7).

<sup>6</sup> 12 A. & E. Enc. p. 406; Elliott, § 1252.

<sup>7</sup> 12 A. & E. Enc. p. 412; 17 A. & E. Enc. p. 1239; Elliott, § 1248.

<sup>8</sup> 12 A. & E. Enc. pp. 399, 402, 403, 410, 411; Elliott, §§ 1249-1252; Stephens' Dig. pp. 304-306.

<sup>9</sup> 12 A. & E. Enc. p. 401; Greenl. § 162p (3).



The authorities are divided upon the question, whether a view is to be considered as additional evidence, or is permitted merely to enable the jury to better comprehend the evidence introduced in court.<sup>1</sup> The former doctrine is correct in principle,<sup>2</sup> and appears to be sustained by the greater weight of authority.<sup>3</sup>

Although view existed at common law,<sup>4</sup> it is almost universally regulated by statute.<sup>5</sup>

The statutes in general provide that, whenever, in the opinion of the court, it is proper that the jury should have a view of real property which is the subject of the litigation, or of the place in which any material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which will be shown to them by the judge, or by a person appointed by the court for that purpose; while the jury are thus absent, no person, other than the judge or person so appointed, shall speak to them on any subject connected with the trial.<sup>6</sup>

A view not authorized by the court is improper,<sup>7</sup> and is ground for a new trial unless such view was without prejudice.<sup>8</sup>

<sup>1</sup> 11 A. & E. Enc. p. 540; Elliott, § P. p. 1054; Greenl. § 131; Stephens' 1243; 22 Enc. P. & P. pp. 1054, 1055; Dig. p. 345; Thayer's Cas. pp. 720-723; Greenl. § 13j; Wigmore, § 1163. Wigmore, § 1163.

<sup>2</sup> ElHott, § 1243; Greenl. § 13j; Wig- <sup>6</sup> Consult statutes of respective more, § 1168. states. In general see 22 Enc. P. & P.

<sup>3</sup> Elliott, § 1243 (contra); Greenl. § pp. 1055-1062.

13, j; Wigmore, § 1168.

<sup>7</sup> Greenl. § 162o (3); Wigmore, §§

<sup>4</sup> 22 Enc. P. & P. p. 1053; Elliott, § 1166, 1167, 1802 (4).

1242; Wigmore, §§ 1163, 1164.

<sup>8</sup> 17 A. & E. Enc. p. 1238; 22 Enc.

<sup>5</sup> Elliott, §§ 1242, 1244; 22 Enc. P. & P. & P. pp. 1062, 1063.

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\* For current cases supplementing all citations in this section, see 5 Current Law, p. 1717, and subsequent volumes.









